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Supreme Court, U.S.
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Application No. A-208

In The

Supreme Court of the United States

OCTOBER TERM, 1991

DORETHA BRYANT
Petitioner,

vs.

BROOKLYN BARBECUE CORPORATION, et. al.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

i. Whether persons who have not been formally sued may be awarded sanctions pursuant to Rule 11, F.R.C.P.?

ii. Whether the attorneys for those persons who have not been formally sued may be awarded sanctions pursuant to Rule 11, F.R.C.P.?

iii. Whether the ignorance of an attorney with respect to the 120 day service requirement of Rule 4(j), F.R.C.P., supports the influence of a Rule 11 "improper purpose"?

iv. Where a complaint's dismissal is predicated upon a *procedural defect,* i.e., its non-service, *and not* because of the want of reasonable inquiry or that it was not well grounded in fact, may, nevertheless, Rule 11 sanctions be imposed, based upon *substantive allegations* and causes of action asserted in that complaint, the merits of which are judicially unknown?

PARTIES TO THE PROCEEDING

Petitioner:

Doretha Bryant

Respondents:

Brooklyn Barbecue Corporation
David Schlee
Stockyards Preservation Company
Preston Kerr (Deceased)
Judith Kerr
William Rauschelbach
Sandra Rauschelbach
Gary Berbiglia

TABLE OF CONTENTS

Page

Report of Opinions 1

Grounds of this Court's Jurisdiction 1

Regulatory Provisions involved in case 1

Concise Statement of the case 3

The Concise Argument 6-15

I. A writ of certiorari should be granted, herein, for the same essential reasons that certiorari was granted in *Donald J. Willy* 6-7

II. Supreme Court Rule 10 Rationale for Granting this Petition for a Writ of Certiorari 7-9

III. The precedents of this Court recoil against, and are repugnant to, the holding of the United States Court of Appeals for the Eighth Circuit in this case 10-15

A. Neither persons who have not been formally sued, nor their attorneys, may be awarded sanctions pursuant to Rule 11, F.R.C.P., for such involves an unnatural reading of the Rule and is in derogation of the plain meaning of the rule 10-11

B. The ignorance of an attorney with respect to the 120 day service requirement of Rule 4(j), F.R.C.P., does not support the inference of a Rule 11 "improper purpose" 11-14

C. Where a complaint's dismissal is predicated upon a *procedural defect*, i.e., its non-service, *and not* because of the want of reasonable inquiry or that it was not well grounded in fact, Rule 11 sanctions may not be imposed, based upon *substantive allegations* and causes of action asserted in that complaint, the merits of which are judicially unknown 14-15

Conclusion 15-16

Certificate of Service 17

TABLE OF CONTENTS–Continued

Appendix	Page
A. Order Denying Rehearing	A1
B. 8th Cir. Opinion @ 4/29/91	B1-B6
C. *KERR, ET AL. V. BRYANT*	C1-C3
D. District Court Opinion	D1-D11
E. Local Rule 35 (WDMo.)	E1
F. Order from Justice Blackmun	F1

TABLE OF AUTHORITIES

Bryant v. Brooklyn Barbecue Corp., 932 F.2d 697 (8th Cir. 1991) 1, 8, 12, 13, 15

Bryant v. Brooklyn Barbecue Corp., 130 F.R.D. 665 (W.D.Mo. 1990) 1 7, 14

Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S._____, 111 S.Ct. 922, 112 L.Ed. 2d 1140 (1991) 8, 9, 12, 13, 15

Chambers v. NASCO, Inc., 501 U.S._____, 111 S.Ct. 2123 115 L.Ed. 2d 27 (1991) 9, 13, 14

Cooter & Gell v. Hartmarx Corp., 496 U.S._____, 110 S.Ct. 2447, 110 L.Ed. 2d 359 (1990) 12, 13, 14

Davis v. Carl, 906 F.2d 533 (11th Cir. 1990) 14

Donald J. Willy, Petitioner v. *Coastal Corporation, et. al.*, 501 U.S._____, 115 L.Ed. 2d 994 (1991) .. 6, 9

Judith Kerr, et. al. v. Doretha Bryant, CV 89-6890 WMB, (CD Cal. 1990) 1, 5

Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 110 S.Ct. 459, 107 L.Ed. 2d 438 (1989) 8, 10, 11

Willy v. Coastal Corporation, et. al., 915 F. 2d 965 (5th Cir. 1990) 6, 7, 8

Zaldivar v. City of Los Angeles, 780 F. 2d 823 (9th Cir. 1986) 14

STATUTES

18 U.S.C. § 1961, *et seq.* 3, 4

28 U.S.C. § 1927 ..... 5, 15

28 U.S.C. § 1254 (1) 1

OTHER AUTHORITIES

Federal Rules of Civil Procedure ..... *Passim*

Rule 4(j) ..... *Passim*

Rule 11 ..... *Passim*

Local Rule 35 (WDMo.) 4, 5

Supreme Court Rule 10 ..... 7, 9

Supreme Court Rule 13.4 1

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPORTS OF OPINIONS

The opinion of the United States Court of Appeals for the Eighth Circuit, is reported in *Bryant v. Brooklyn Barbecue Corp.*, 932 F. 2d 697 (8th Cir. 1991). The opinion of the United States District Court for the Western District of Missouri is reported in *Bryant v. Brooklyn Barbecue Corp.*, 130 F.R.D. 665 (W.D.Mo. 1990). A correlative opinion in *Judith Kerr, et. al. v. Doretha Bryant*, CV 89-6890 WMB, (CD Cal. 1990), while officially unreported, is appended hereto and is also referenced in *Bryant v. Brooklyn Barbecue Corp.*, 932 F. 2d 697, 699, footnote 5 (8th Cir. 1991).

GROUNDS OF THIS COURT'S JURISDICTION

This Court's jurisdiction derives from an Order dated September 18, 1991, by Associate Justice Harry A. Blackmun, granting Petitioner's application for an extension of time within which to file this petition for a writ of certiorari, to the United States Court of Appeals for the Eighth Circuit, until October 15, 1991.

This Court's jurisdiction further derives from 28 U.S.C. 1254(1) and Rule 13.4, in that the Petitioner is seeking review, by writ of certiorari, of an opinion of the United States Court of Appeals for the Eighth Circuit, decided April 29, 1991, in *Bryant v. Brooklyn Barbecue Corp.*, 932 F. 2d 697 (8th Cir. 1991), as to which an Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc was entered on June 17, 1991.

REGULATORY PROVISIONS INVOLVED IN CASE

Rule 4(j), Federal Rules of Civil Procedure:

Summons: Time Limit for Service.

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the

complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

Rule 11, Federal rules of Civil Procedure:

Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or

parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

CONCISE STATEMENT OF THE CASE

A lawsuit was filed on July 28, 1989, in the United States District Court for the Western District of Missouri by Doretha Bryant against Brooklyn Barbecue Corporation, David Schlee, Stockyards Preservation Company, Preston Kerr (Deceased), Judith Kerr, William Rauschelbach, Sandra Rauschelbach, and Gary Berbiglia, Case No. 89-0719-CV-W-8, alleging, *inter alia*, civil RICO violations, 18 USC § 1961, et seq.

That suit was not served upon any of the *putative* defendants within one hundred and twenty days (120) of its filing, as required by Rule 4(j), F.R.C.P. The summonses and complaint were not served upon any of the would-be defendants within 120 days of the lawsuit's filing, because undersigned counsel for the Petitioner was unaware of the 120 day service requirement imposed by Rule 4(j), F.R.C.P. Indeed, the *original* complaint and summonses were *never* served upon any prospective defendant.

On the same date that Ms. Bryant filed her action, one of the *putative* defendants, Respondent Preston Kerr, (now deceased), was being sentenced to two (2) years of probation, and being fined $10,000, in the United States District Court for the Western District of Missouri, pursuant to a plea agreement, for having engaged in "interstate transportation of money obtained by fraud from Mercantile Bank in connection with a $300,000 loan," in case number 88-00030-01-CR-W-3. Preston Kerr had been indicted *inter alia*, for "making a false statement to Republic Bank concerning a loan of $340,000 to *Brooklyn Barbecue Corporation*," which entity, along with its principals, i.e., the Kerrs, the Rauschelbachs, and Mr. Berbiglia, were also named defendants in Case No. 89-0719-CV-W-8.

The daily newspaper, *The Kansas City Star*, printed both stories, i.e., the fact of Ms. Bryant's lawsuit, and the fact of Preston Kerr's sentencing, in its July 29, 1989 issue.

On December 28, 1989, Petitioner Bryant filed a first amended complaint, upon which new summonses were issued, alleging, *inter alia*, civil RICO violations, 18 USC 1961, et seq. This first amended complaint, and the new summonses issued therewith, was served upon all of the defendants.

Meanwhile, on November 28, 1989, the putative defendants filed practically identical motions to dismiss the *original* complaint for failure to serve same within one hundred and twenty (120) days, pursuant to Rule 4(j), F.R.C.P., and they also moved for the imposition of sanctions upon Ms. Bryant and her attorney, pursuant to Rule 11, F.R.C.P., for her failure to serve them with the original complaint and summonses.

On March 14, 1990, the District Court, the Honorable Joseph E. Stevens, entered an Order, *inter alia, dismissing the original complaint,* without prejudice, pursuant to Rule 4(j), *quashing service of the first amended complaint,* and imposing sanctions upon Bryant and her attorney, pursuant to Rule 11, F.R.C.P.

On March 16, 1990, Ms. Bryant filed a *second* complaint, case no. 90-0265-CV-W-6, which was identical to her, now *quashed, first amended complaint* for damages and equitable relief, except for the words "first amended." This new complaint was timely and personally served upon all of the putative defendants in the original action.

This new complaint was assigned to the Honorable Howard Sachs, under the blind draw, employed for the distribution of cases among federal judges in the Western District of Missouri. And on March 22, 1990, pursuant to Local Rule 35, Judge Sachs transferred the "essentially refiled case" to the Honorable Joseph E. Stevens, the judge, who had been assigned the *original case,* No. 89-0719-CV-W-8.

By Order dated May 15, 1990, the District Court *imposed monetary sanctions* of $14,030 against plaintiff's attorney only; and *stayed* all proceedings in the new case, No. 90-0265-CV-W-6, contingent upon the payment of the assessment of $14,030, by Ms. Bryant's attorney, *to the putative defendants' attorneys,* in case number 89-0719-CV-W-8, the old, original case, in which there had never been any service of the *original* complaint.

Ms. Bryant moved the Court to alter or to amend its Order of May 15, 1990, and to stay execution thereon, by motion filed on May 25, 1990. In addition, on June 11, 1990, Ms. Bryant moved the Court to "re-transfer" the newly filed case, no. 90-0265-CV-W-6, to Judge Sachs, pursuant to Local Rule 35.

All of the aforesaid Orders from the United States District Court for the Western District of Missouri, were entered without the benefit of *any kind of hearing*, at any time, on any subject, and *without notice* from the Court that sanction would be imposed. The District Court judge never *read*, nor, by his own admission, inquired into the *merits* of either the original, first amended, or new complaint. Instead, that judge imposed sanctions based upon affidavits submitted by the Respondents saying how much the publicity generated by the lawsuit had hurt them.

Significantly, on November 28, 1989, *the same date* that all of the Respondents moved to dismiss Bryant's original lawsuit against them, and moved for sanctions, in *Missouri*, Respondent Judith Kerr, the wife of Respondent-felon Preston Kerr, filed a correlative lawsuit in the United States District Court for the Central District of *California*, against Doretha Bryant, for declatory judgment, respecting the ownership of certain stock in the Respondent Stockyards Preservation Company. That California lawsuit was dismissed with prejudice on May 31, 1990. However, that District Court refused to grant sanctions under Rule 11, F.R.C.P. or 28 U.S.C. § 1927 to Doretha Bryant or her undersigned attorney, who travelled 2,000 miles to California to get that frivolous lawsuit dismissed, for lack of personal jurisdiction over Doretha Bryant, as she was sued in a state with which she had *no contact* for thirty (30) years.

By order dated July 27, 1990, U.S. District Judge Joseph Stevens *overruled Ms. Bryant's motion to alter or to amend his Order of May 15, 1990*, which dismissed her original action pursuant to Rule 4(j), and granted sanctions to defendants' *attorneys*, pursuant to Rule 11. The Order also *denied Ms. Bryant's motion for stay of execution thereof*, with respect to the sanctions which had been imposed on Bryant's

attorney, *only;* and it also *denied Bryant's motion to re-transfer the newly filed case,* No. 90-0265-CV-W-6, to Judge Sachs.

An appeal to the United States Court of Appeals for the Eighth Circuit followed: case no. 90-2349. The case was argued on March 11, 1991, and a decision by a panel of that Court, consisting of Circuit Judge Bowman, Senior Circuit Judge Heaney, and Senior District Judge Larson, affirmed the decision of Judge Stevens in an opinion filed on April 29, 1991. An Order Denying Petition for Rehearing and Suggestions for Rehearing En Banc was entered on June 17, 1991.

THE CONCISE ARGUMENT

I.

A writ of certiorari should be granted, herein, for the same essential reasons that certiorari was granted in *Donald J. Willy.*

This Court has granted a petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit, limited to Question 1, presented by that petition, in the case *Donald J. Willy,* Petitioner v. *Coastal Corporation, et. al.*, No. 90-1150, 501, U.S._____, 115 L.Ed. 2d 994 (August 1991). That case below is reported at 915 F. 2d 965 (5th Cir. 1990).

That case, substantially like that for which review is sought herein, involves the propriety of the imposition of Rule 11 sanctions upon an attorney and his client by a district court judge, who also dismissed the underlying civil RICO action, where the district court judge lacked subject matter jurisdiction over the merits of the underlying claim. In the case herein, for which review is sought, the district court judge imposed Rule 11 sanctions upon the attorney and the client (later amended to just the attorney), and dismissed the underlying civil RICO action, even though:

1. The putative defendants were never served with the original summons or complaint;
2. The action was dismissed without prejudice for

want of service within 120 days, pursuant to Rule 4(j), F.R.C.P.;

3. The district court admitted, in its Order, that it had not read the complaint to determine whether the factual averments were well grounded in fact, *Bryant v. Brooklyn Barbecue Corp.*, 130 F.R.D. 665, 670 (W.D.Mo. 1990);

4. The district court never held any kind of hearing to determine whether the specific filing, the *original* complaint, was "baseless", or whether the sanction of attorney's fees was warranted;

5. The sanction of attorney's fees, pursuant to Rule 11, F.R.C.P., was awarded not to the putative defendants, the inchoate, would-be "parties", but to their attorneys; and

6. The sanction of attorney's fees was not confined to the cost of the "discrete event", the filing of the complaint, but shifted almost the entire fees associated with the underlying still-born litigation to petitioner's attorney.

The underlying District Court decision is cited as *Bryant v. Brooklyn Barbecue Corp.*, 130 F.R.D. 665 (W.D.Mo. 1990). At least in *Willy*, the defendants were served. At least in *Willy* the district court did conduct "two separate hearings", 915 F. 2d at 966. At least in *Willy* the sanction of attorney's fees was awarded to a "party", Coastal, as the "plain meaning" of Rule 11 contemplates, and not to Coastal's attorneys, as happened below herein. At least in *Willy* the district court judge read the complaint.

II

Supreme Court Rule 10 Rationale for Granting this Petition for a Writ of Certiorari.

A writ of Certiorari should and must issue to the United States Court of Appeals for the Eighth Circuit, because:

a. the actions of the district court, herein, were ex-

traordinary and unprecedented in the annals of American law;

b. the Petitioner, in her brief, will be able to show to this Court that the questions presented herein are at least as, and conceivably more compelling than, those presented in *Willy, supra;*

c. the 8th Circuit in affirming the district court so far departed or sanctioned departure by the lower court as to call for the exercise of this Court's power, Supreme Court Rule 10.1(a);

d. the 8th Circuit in affirming the district court has decided important questions of federal law, which have not been but should be decided by this court, Supreme Court Rule 10.1(c), i.e.:

> i. Whether persons who have not been formally sued may be awarded sanctions pursuant to Rule 11, F.R.C.P.?
>
> ii. Whether the attorneys for those persons who have not been formally sued may be awarded sanction pursuant to Rule 11, F.R.C.P.?
>
> iii. Whether the ignorance of an attorney with respect to the 120 day service requirement of Rule 4(j), F.R.C.P., *Bryant, supra,* 932 F. 2d at 699, supports the inference of a Rule 11 "improper purpose"?
>
> iv. Where a complaint's dismissal is predicated upon a *procedural defect,* i.e., its non-service, *and not* because of the want of reasonable inquiry or that it was not well grounded in fact, may, nevertheless, Rule 11 sanctions be imposed, based upon *substantive allegations* and causes of action asserted in that complaint, the merits of which are judicially unknown?

e. the 8th Circuit in affirming the district court has decided the foregoing questions in a manner which conflicts directly with applicable decisions of this court, to wit:

> i. *Pavelic & LeFlore v. Marvel Entertainment Group,* 493 U.S._____, 110 S.Ct. 459, 107 L.Ed.

2d 438 (1989) (if Rule 11 is given its "plain meaning" how can unserved persons, and even less so their attorneys be "parties", within the meaning of the Rule, and therefore entitled to sanctions?)

ii. *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S._____, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991) (if no examination of the merits of a "specific filing" is ever conducted, how can one reasonably draw the inference that it is not "well founded", and how can one reasonably infer that a specific filing is "baseless", when one has never read that filing?)

iii. *Chambers v. NASCO, Inc.*, 501 U.S._____, 111 S.Ct. 2123, 115 L.Ed.2d 27, 46 (1991) (if a "reasonableness standard", and not "subjective bad faith" is the appropriate test for gauging the propriety of imposing Rule 11 sanctions, how can an attorney, whose failure to serve a complaint within 120 days, out of ignorance of the Rule 4(j) requirement, support the inference of an "improper purpose"? And, what Rule 11 "notice requirements" *Id.*, 115 L.Ed.2d at 52, did the District Court afford Petitioner's attorney prior to imposing Rule 11 sanctions?)

Hence, granting this petition for a writ of certiorari will afford Petitioner an opportunity to more fully develop the themes outlined herein, in her brief and during oral argument, given this Court's disposition to revisit Rule 11, as evidenced by the very recent grant of certiorari in *Willy, supra*. Accordingly, petitioner now has reasonable and *renewed* cause to hope that this Court may likewise be disposed to grant certiorari herein. Especially is this so, where practically every element of Supreme Court Rule 10.1 is satisfied by the factual and legal circumstances inhering in this controversy.

III

The precedents of this Court recoil against, and are repugnant to, the holding of the United States Court of Appeals for the Eighth Circuit in this Case.

A. Neither persons who have not been formally sued, nor their attorneys, may be awarded sanctions pursuant to Rule 11, F.R.C.P., for such involves an unnatural reading of the Rule and is in derogation of the plain meaning of the rule.

In *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 110 S.Ct. 456, 107 L. Ed 2d 438 (1989), Justice Scalia, writing for the majority, stated:

> We give the Federal Rules of Civil Procedure their plain meaning . . . generally with them as with a statute, "[w]hen we find the term . . . unambiguous, judicial inquiry is complete.

Id. at 110 S.Ct. at 458. The opinion continues:

> In the Court of Appeals' words, "[law firm] responsibility for Rule 11 sanctions will create strong incentives for internal monitoring, and greater monitoring will result in improved pre-filing inquiries and fewer baseless claims." 854 F. 2d, at 1480. Even if it were entirely certain that liability on the part of the firm would more effectively achieve the purposes of the Rule, we would not feel free to pursue that objective at the expense of a textual *interpretation as unnatural* as we have described. Our task is to apply the text, not to improve upon it . . . The purpose of the provision in question, however, is *not reimbursement* but "sanction"; and the purpose of Rule 11 as a whole is to bring home to the individual signer his personal, nondelegable responsibility. (emphasis added.)

Id. at 459-460 Under Rule 11, Federal Rules of Civil Procedure, only "parties" are entitled to recover attorney's fees. The defendants were never "parties", because they were

never served, nor entered a general appearance. That rule states, in pertinent part:

> If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other *party or parties* the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

Since the duty of the District Court, and the 8th Circuit Court of Appeals, like that of the United States Supreme Court was "to apply the text, not to improve upon it". *Pavelic, supra,* 110 S.Ct. at 460. To ignore the phrase "party or parties" is also to engage in an "unnatural" construction of the rule. The language "parties or parties" is "unambiguous"; therefore, "judicial inquiry is complete". The defendants herein were never "parties". Therefore they were not entitled to sanctions afforded "parties" under Rule 11. Lastly, the purpose of Rule 11 is *"not reimbursement* but sanction". *Id.* The 8th Circuit, however, has approved of "reimbursement", to attorneys for persons who are not even "parties" within the plain meaning of Rule 11.

For this reason, a writ of certiorari must issue to the 8th Circuit Court of Appeals.

B. The ignorance of an attorney with respect to the 120 day service requirement of Rule 4(j), F.R.C.P., does not support the inference of a Rule 11 "improper purpose".

Is ignorance of an obscure subsection of constantly evolving federal rules a sanctionable offense? Is a violation of Rule 4(j), also necessarily a violation of Rule 11? Because the 8th Circuit says that they are, a writ of certiorari to that Court must issue.

During oral argument in response to a question from the panel at the 8th Circuit, Bryant's counsel explained that the original complaint was not served upon the would-be defendants, because he did not know about the 120 day service requirement imposed by Rule 4(j). In its opinion, the

panel, in reflecting upon this statement by Bryant's counsel, stated: "We have no reason to doubt it, and we appreicate the damaging effect the court's sanction has had on plaintiff's counsel, a sole practitioner of limited means". *Bryant, supra*, 932 F. 2d at 699. In posing its question during oral argument, the panel did no more than that prescribed in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S._____, 110 S.Ct. 2447, 2459 (1990):

> ". . . [t]o determine whether an attorney's prefiling inquiry was reasonable, a court must consider all the circumstances of a case. An inquiry that is unreasonable when an attorney has months to prepare a complaint may be reasonable when he has only a few days before the statute of limitations runs. In considering whether a complaint was supported by fact and law "to the best of the signer's knowledge, information and belief," a court must make some assessment of the signer's *credibility*." (emphasis added).

Well, if the distinguished panel which elicited the response from Bryant's counsel during oral argument, and which seized the opportunity (unlike the District Court, which never held a single hearing) to assess Bryant's counsel's demeanor and *credibility*, during oral argument, could find "no reason to doubt" the truth or veracity of the reason for non-service of the original complaint, it had no reason not to reverse the District Court.

"Improper purpose", within the meaning of Rule 11, subsumes and presumes the notion of "intent". Ignorance vitiates intent. And, intent vitiates ignorance. The two are, to say the least, antithetical. If one does not know a given thing, one cannot intend that which one does not know. This applies even though the "objective reasonableness standard" *Business Guides v. Chromatic Comm.*, supra, 112 L.Ed. 2d at 1161, applies to represented parties and attorneys alike. "Purpose" connotes knowingly, deliberately, and intentionally doing something. Ignorance is its opposite.

But, "deference" to *facts* is one thing; capitulation to an *"inference"*, *Bryant v. Brooklyn Barbecue Corp.*, supra, 932 F. 2d at 699-700, is quite another. Herein, without ever

conducting a hearing, without ever inquiring into the merits of the original, *never served* complaint, the District Court was left with nothing but an "inference". The District Court having failed to read the complaint, was certainly in no position to find any *facts*. "In the event that a District Court misapplies the Rule in a particular case, the error can be corrected on appeal." *Business Guides v. Chromatic Comm., supra*, 112 L.Ed. 2d at 1161. This is the case, and this is the *time* for that "correction" contemplated by the Supreme Court.

That vaunted and hypothetical line of defense against whim and caprice; that bulwark against arbitrariness and abuse; that rampart guarding due process and equal protection, which was supposed to have been manned by the Courts of Appeals, is now, overrun, in tatters, effectively, nonexistent. This whole troublesome matter of sanctions has been left to the District Courts–to do as they wish–as they are, after all, " 'on the front lines of litigation,' who are best situated to determine when a Rule 11 sanction is warranted. *Cooter*, 110 S.Ct. at 2460." *Bryant v. Brooklyn Barbecue Corp., supra*, 932 F. 2d at 700.

In conclusion, while ignorance of the 120 day service requirement may not constitute "good cause" for not serving the complaint, such as to avoid a dismissal without prejudice, pursuant to Rule 4(j), F.R.C.P., that same ignorance, even under the objective reasonableness standard, cannot support the imposition of sanctions under Rule 11.

If such were the case, *every procedural error* would be a sanctionable offense, because any attempt to distinguish between degrees of error, invites a nostalgic return to the subjective bad faith standard, which this court has already rejected. It is to be noted that the U.S. Supreme Court in *Chambers v. NASCO, Inc.*, 501 U.S._____, 111 S.Ct. 2123, 115 L.Ed. 2d 27, 46, n.11 (1991), states:

> Indeed, Rule 11 was amended in 1983 precisely because the *subjective bad-faith standard was difficult* to establish and courts were therefore reluctant to invoke it as a means of imposing sanctions.

Consequently, Rule 11 "imposes *an objective standard of reasonable inquiry* which does not mandate a finding of bad faith." *Id.* There was no "bad faith" below, and under the objective standard of reasonable inquiry, failure to ever serve a person with a complaint–i.e.–failure to sue them, cannot, logically or legally, be a sanctionable offense.

A writ of certiorari should therefore issue to the Court of Appeals for the Eighth Circuit.

C. Where a complaint's dismissal is predicated upon a *procedural defect*, i.e., its non-service, *and not* because of the want of reasonable inquiry or that it was not well grounded in fact, Rule 11 sanctions may not be imposed, based upon *substantive allegations* and causes of action asserted in that complaint, the merits of which are judicially unknown.

The District Court, in its opinion, made the following startling admission, preparatory to imposing Rule 11 sanctions upon Petitioner's counsel:

> "The instant case has obviously not proceeded to a stage where the court can determine, *based on its own examination of the FACTS, whether the original complaint was warranted.* (emphasis added).

Bryant v. Brooklyn Barbecue Corp., et. al., 130 F.R.D. 665, 670 (W.D.Mo 1990). QUERY: If, as the District Court admits, it could not, and, indeed, did not, "based on its own examination of the facts", "determine" whether the original complaint "was warranted", how could it determine, *absent a hearing of any kind*, ever, *Davis v. Carl*, 906 F. 2d 533, 538 (11th Cir. 1990); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S._____, 110 S.Ct. 2447, 2452 (1990) what that attorney's "*sole* purpose" was? And how could the 8th Circuit affirm such a holding in the face of such an admission?

The subjective intent of the attorney or litigant is not a basis for a Rule 11 violation when a complaint which complies with the standard of being "well-grounded in fact and warranted by . . . law" is filled. See, e.g. *Zaldivar v. City of Los Angeles* 780 F. 2d 823, 832 (9th Cir. 1985). As the District Court, by its own admission, never inquired into the *merits* of the original complaint, its sanction of Peti-

tioner's attorney, based upon its perception of that attorney's subjective intent, was legal error, warranting immediate correction. *Business Guides v. Chromatic Comm., supra*, 112 L.Ed. 2d. at 1161.

Rule 11 necessarily is directed at the *content* of pleadings and other papers. If a district court does not determine, based upon its own examination of the facts, whether a complaint is warranted, prior to imposing sanctions, it will have, necessarily, abused its discretion, even as it will have abdicated, or shirked, its judicial duty. And, in suffering it to do so, the 8th Circuit Court of Appeals has done likewise.

In sum, what was *in* the original complaint or what was *not in* the original complaint, is and was equally *irrelevant*, for the dismissal was not predicated upon the *content* of the complaint. However, paradoxically and predjudicially, the Rule 11 sanctions *were* predicated upon *content* of the original complaint, even though the contents were judicially unknown, and that original complaint was *never served*. Truly, this is a juridical nonsequitur!

For this reason, also, a writ of certiorari to the 8th Circuit Court of Appeals should, and must, issue.

CONCLUSION

Petitioner, herself, sought but was denied Rule 11 sanctions, and sanctions under 28 U.S.C. 1927, after one of the Respondents herein unsuccessfully sued her in California, in what was truly frivolous litigaton. See, *Bryant v. Brooklyn Barbecue Corp., supra*, 932 F. 2d at 699, footnote 5. If ever there was an archetype of the largely unprincipled whim, caprice, and vagaries of Rule 11, as administered by the nation's Courts of Appeals and District Courts, it is embodied in Bryant's attorney, who was sanctioned for suing, but not serving putative defendants in this case. Yet, who was denied Rule 11 and 28 U.S.C. § 1927 sanctions, in another case, that he had to travel 2,000 miles to get dismissed, after his client was sued and served, in a state with which she had had *no contact* for thirty (30) years. (A copy of that decision is appended hereto).

This is a case of first impression in the country, and it is therefore, necessarily, an extraordinary case, warranting the grant of a petition for writ of certiorari; or, the holdings of the lower courts shall remain forever a blight on the face of the American judiciary, until the memory of a man runneth naught to the contrary.

WHEREFORE, Petitioner prays for relief consistent with the foregoing, and prays that a writ of certiorari issue to the United States Court of Appeals for the 8th Circuit.

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CERTIFICATE OF SERVICE

I hereby certify that 3 copies of the foregoing Petition for Writ of Certiorari were mailed this 15TH day of OCTOBER 1991 to:

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 90-2349 WM

DORETHA BRYANT
Appellant,

vs.

BROOKLYN BARBECUE CORPORATION,
WILLIAM RAUSCHELBACH,
SANDRA RAUSCHELBACH,
GARY BERBIGLIA,
PRESTON KERR,
JUDITH KERR,
ARTHUR BRYANT'S INCORPORATED,
DAVID SCHLEE AND
STOCKYARD PRESERVATION,
Appellees

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC.

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

June 17, 1991

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2349

DORETHA BRYANT
Appellant,

vs.

BROOKLYN BARBECUE CORPORATION,
WILLIAM RAUSCHELBACH,
SANDRA RAUSCHELBACH,
GARY BERBIGLIA,
PRESTON KERR,
JUDITH KERR,
ARTHUR BRYANT'S INCORPORATED,
DAVID SCHLEE AND
STOCKYARD PRESERVATION,
Appellees

Submitted: March 11, 1991
Filed: April 29, 1991

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

Before BOWMAN, Circuit Judge, HEANEY, Senior Circuit Judge, and LARSON,* Senior District Judge.

LARSON, Senior District Judge

The sole issue raised in this appeal is whether the district court abused its discretion in imposing sanctions on plaintiff's counsel under Fed. R. Civ. P. 11. Because we find no

*The HONORABLE EARL R. LARSON, Senior United States District Judge for the District of Minnesota, sitting by designation.

abuse of discretion based on the record presented on appeal, we affirm.

On July 28, 1989, plaintiff Doretha Bryant filed a complaint against defendants Brooklyn Barbecue Corporation, Arthur Bryant's Inc., the Stockyard Preservation Co., and various officers and directors of these companies. The complaint in this action, Civ. No. 89-0719, alleged defendants had engaged in a pattern of racketeering activity designed to deprive plaintiff of her interest in the property she inherited from her uncle, Arthur Bryant, the famous Kansas City barbecue restaurateur. The complaint was not served within the 120 days provided in Fed. R. Civ. P. 4(j),[1] and defendants filed a motion to dismiss the complaint and for sanctions pursuant to Fed. R. Civ. P. 11.[2] In response, plaintiff's counsel indicated he was engaged in other state court actions involving many of the same parties and he intended to file a first amended complaint within two weeks "now that the necessary groundwork ha[d] been done."

---

1 Fed. R. Civ. P. 4(j) provides:

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

2 Fed. R. Civ. P. 11 provides in relevant part:

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

The district court[3] granted the defendants' motion to dismiss, finding plaintiff had failed to demonstrate good cause for her failure to serve the complaint. The district court also ruled sanctions were appropriate because plaintiff's counsel effectively admitted he had conducted the "reasonable inquiry" required by Rule 11 only *after* the original complaint had been filed and further admitted that the original complaint had been filed to coincide with the criminal sentencing of one of the defendants. Under these circumstances, the court concluded the original complaint was filed solely for an improper purpose, namely to attract publicity and to harass the defendants.

After giving plaintiff an opportunity to respond to the affidavits presented by defendants regarding the amount of their attorney's fees, the court assessed $14,030 in sanctions against plaintiff's attorney.[4] In the meantime, plaintiff's counsel had initiated a second action by refiling the amended complaint he had prepared to file in the original action. In its order imposing sanctions, the court stayed all proceedings in this second action, Civ. No. 90-0265, until the $14,030 had been paid. Plaintiff's request to alter or amend the court's imposition of sanctions was denied, and plaintiff appealed.

Subsequent to the filing of this appeal, plaintiff and defendants stipulated to a dismissal of the second action, Civ. No. 90-0265, without prejudice, and the court granted the dismissal along with plaintiff's counsel's motion to withdraw as counsel in that case. Thus, both the original complaint and the amended complaint have now been dismissed without prejudice. Plaintiff does not challenge either of these dismissals. Plaintiff does contend that the district court's imposition of Rule 11 sanctions should be reversed.

---

3 The Honorable Joseph E. Stevens, Jr., United States District Judge for the Western District of Missouri.

4 Plaintiff's counsel had requested that any sanctions be imposed against him and not his client, because "it was he who did not serve the original complaint, not his client. She is blameless."

II.

Because the issues involved in determining whether an attorney has violated Rule 11 "involve 'fact-intensive, close calls,' " we review all aspects of the district court's order under an abuse of discretion standard. *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447, 2460, 2461 (1990). Plaintiff's counsel argues the court lacked jurisdiction to impose sanctions because defendants in this case were never served with the original complaint, and hence could not be "parties" entitled to an award of expenses under Rule 11. We find the Supreme Court's decision in *Cooter* resolves this issue in favor of the court's authority to award sanctions even though the original complaint was dismissed prior to service on the defendants. *Id.* at 2454-57. The violation in this case occurred when the original complaint was filed for an improper purpose and without the "reasonable inquiry" required by Rule 11. Under these circumstances,

> [t]he district court's jurisdiction, invoked by the filing of the underlying complaint, supports consideration of both the [motion to dismiss] the action and the motion for Rule 11 sanctions arising from that filing.

Id. at 2455.

With regard to whether the court's finding of a Rule 11 violation was justified, plaintiff's counsel argues that the court erred in imposing sanctions without ever conducting a hearing or inquiring into the merits of the claims raised in plaintiff's complaint. Counsel never requested such a hearing before the district court, however, nor did he offer an affidavit to the court which explained either the investigation he had undertaken prior to filing the original complaint or the factual basis for the allegations made. *Cf. Cooter*, 110 S.Ct. at 2452 (counsel filed three affidavits setting forth prefiling research). The inference the district court drew from the papers counsel had filed was that counsel knew he had not conducted a reasonable inquiry of the facts and the law prior to filing the original complaint, but filed it prematurely so as to benefit from the publicity generated by defendant Preston Kerr's criminal sentencing on charges relating to bank fraud.

According to the affidavits presented by defendants William Rauschelbach, Sandra Rauschelbach, and Gary Berbiglia, this premature filing was harmful to them. Defendant Rauschelbach, for example, stated that many regular customers of his Golden Ox restaurant had asked about the lawsuit and "have made comments about me being a racketeer." Defendants' affidavits further set forth details regarding the opportunities to serve the complaint which had been available to plaintiff's counsel, opportunities which included at least one face-to-face meeting in connection with the state court litigation involving plaintiff and these defendants. Defendants' affidavits indicated that plaintiff had served them with papers in connection with other litigation since the original complaint had been filed, but had made no attempt to serve the original complaint within the 120 days allowed by Rule 4(j).

Plaintiff's counsel states that he fully intended to file and serve an amended complaint, and attempted to do so after the 120 days had passed. Counsel explained at oral argument that he simply was unaware of the 120 day rule. Although counsel never advanced this explanation to the district court, we have no reason to doubt it, and we appreciate the damaging effect the court's sanction has had on plaintiff's counsel, a sole practitioner of limited means. Plaintiff's counsel claims the result in this case is particularly unfair because plaintiff was denied *her* request for attorney's fees incurred in obtaining dismissal of a suit brought in California by Judith Kerr, one of the defendants herein.[5]

Our role in reviewing the district court's order imposing sanctions in this case is, however, quite limited. Recogniz-

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5 The papers filed by plaintiff's counsel in the California action indicated that Ms. Bryant was a lifelong resident of Kansas City, Missouri, and had "never set foot in California for over thirty years." The California district court judge concluded "[t]he uncontroverted evidence, therefore, is that Bryant has not had sufficient contacts with the state of California to permit the court's exercise of either general jurisdiction or specific jurisdiction over her in this action." The court refused without comment Bryant's request for Rule 11 sanctions. *See Kerr v. Bryant*, Civ. No. 89-6890 (C.D. Cal. May 31, 1990).

ing that "fact-bound resolutions cannot be made uniform through appellate review, de novo or otherwise," the Supreme Court has instructed appellate courts to defer to the determinations of those "on the front lines of litigation," who are best situated to determine when a Rule 11 sanction is warranted. *Cooter,* 110 S.Ct. at 2460. Defendants' counsel in this case submitted affidavits in support of their request for approximately $24,000 in attorney's fees incurred since the filing of plaintiff's original complaint. The district judge concluded an award of a portion of these fees was reasonable based on the record before him, and we can find no abuse of discretion in this judgment.

In addition to their award of fees at the district court level, defendants have also requested this Court to award them attorney's fees on appeal pursuant to Fed. R. App. 38.[6] Because we find plaintiff's appeal was *not* frivolous, we deny defendants' Rule 38 motion. Plaintiff's cross-motion for sanctions is also denied. The judgment of the district court is affirmed, and each party shall bear his, her, or its own costs on appeal.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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6 Fed. R. App. P. 38 provides:

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JUDITH KERR AND HAL JUERGENS,
Plaintiffs,

vs.

DORETHA BRYANT,
Defendant.

CV 89-6890 WMB

ORDER

BACKGROUND

In this action, plaintiffs Judith Kerr ("Kerr") and Hal Juergens ("Juergens") are suing Doretha Bryant to resolve the disputed ownership of shares of stock of The Stockyards Preservation Company ("SPC"), a Missouri corporation with its headquarters in Santa Barbara, California. Plaintiffs allege that except for one share which is owned by William Rauschelbach, all of the outstanding shares of SPC stock are owned by plaintiffs, with Kerr owning 4,500 shares and Juergens owning 1,000 shares. Plaintiffs further allege that defendant Bryant has repeatedly published claims that she and another person are the owners of SPC stock, and that by publishing those false claims, Bryant is interfering with the ability of plaintiffs, as owners of SPC, to manage and operate the company. By way of relief, plaintiffs are seeking 1) a declaration that plaintiffs are owners of all but one share of SPC stock, and 2) an injunction restraining Bryant and her agents from making false claims about the ownership of SPC stock.

Plaintiffs previously moved for entry of default judgment against Bryant on the grounds that Bryant failed to an-

swer the complaint. A hearing on that motion was scheduled for April 30, 1990, at which time Mr. Larry Coleman, an attorney licensed to practice in Missouri, unexpectedly appeared on behalf of Bryant. The court then continued the hearing to allow Bryant to file a motion to set aside the default.

Bryant now moves to quash the service of process upon her and to dismiss this action for lack of personal jurisdiction. Bryant also moves for an award of sanctions against plaintiffs, pursuant to Fed. R. Civ. P. 11. Plaintiffs have renewed their motion entry of default judgment.

DISCUSSION

Plaintiffs, as the parties seeking to invoke the court's jurisdiction, bear the burden of establishing that personal jurisdiction exists. *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986). On a motion to dismiss, plaintiffs are "obligated to come forward with facts, by affidavit or otherwise, supporting personal jurisdiction." *Id.* (quoting *Ampa Marketing Systems, Inc. v. Jobar International, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977)).

To establish personal jurisdiction, plaintiffs must allow that the law of the forum state confers personal jurisdiction, and that its exercise would not be inconsistent with federal due process. *Id.* Under California law, if the nonresident defendant's activities within the state are "substantial" or "continuous or systematic," there is a sufficient relationship between the defendant and the state to support jurisdiction even if the cause of action is unrelated to the defendant's forum activities. *Scott*, 792 F.2d at 927. This is commonly referred to as "general jurisdiction." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 104 S.Ct. 1868, 1872 & n.9 (1984). If the defendant lacks sufficient ties to support general jurisdiction, a court may still exercise personal jurisdiction over the defendant if the cause of action arises out of or is related to the defendant's forum activities, *Scott*, 792 F.2d at 927. This is commonly referred to as "specific jurisdiction." *Helicopteros*, 104 S.Ct. at 1868 and n.8.

The complaint says nothing about defendant Bryant's con-

nection to the state of California. Nor have plaintiffs submitted any evidence outside the pleadings to establish a basis for this court's jurisdiction over Bryant, even after having been allowed additional time by the court to do so.

In contrast, Bryant has submitted a declaration in which she states (1) she is a lifelong resident and citizen of Kansas City, Missouri; (2) she has never set foot in California for over thirty years; (3) she does not own any property in California; (4) she has never communicated with the media in California; and (5) she has never put any document or thing in the stream of commerce purposely directed at California.

The uncontroverted evidence, therefore, is that Bryant has not had sufficient contacts with the state of California to permit the court's exercise of either general jurisdiction or specific jurisdiction over her in this action.

Accordingly, Bryant's motion to quash the service of process upon her, and Bryant's motion to dismiss are granted. Bryant's motion for Rule 11 sanctions is denied. Plaintiffs' motion for entry of default judgment is denied.

Dated: May 31, 1990

WM. MATTHEW BYRNE, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT

W.D. MISSOURI, W.D.

DORETHA BRYANT
Plaintiff,

vs.

BROOKLYN BARBECUE CORPORATION, et. al
Defendants

No. 89-0719-CV-W-8

March 14, 1990.

Alleged owner of personal property devised to her by barbecue restaurateur filed RICO action against defendants who allegedly engage in pattern of racketeering activity to deprive plaintiff of that interest. On defendant's motion to dismiss and for sanctions the District Court, Stevens, J., held that: (1) inquiry into whether defendants were prejudiced by plaintiff's failure to effect service within 120 days was not appropriate where plaintiff failed to establish good cause for delay; (2) service of amended complaint had to be quashed since good cause for failure to timely serve original complaint was not established; and (3) imposition of Rule 11 sanctions was warranted in light of failure to conduct reasonable inquiry before filing complaint and evidence that complaint was filed to obtain publicity and harass defendants.

Motions granted.

1. Federal Civil Procedure Key 417

A plaintiff's desire to amend her complaint before effecting service did not constitute good cause for failure to serve defendants within 120 days of the filing of the original complaint. Fed. Rules Civ. Proc. Rule 4(j), 28 U.S.C.A.

2. Federal Civil Procedure Key 417

Inquiry into whether defendants were prejudiced by a plaintiff's failure to effect service within 120 days was not appropriate where the plaintiff had failed to establish good cause for the delay; plaintiff admitted she made no attempt to serve defendants within the 120-day period because she knew she would ultimately file an amended complaint containing more specific factual allegations. Fed.Rules Civ.Proc.Rule (j), 28 U.S.C.A.

3. Federal Civil Procedure Key 417

Service of an amended complaint had to be quashed even though service on that complaint was successful where plaintiff failed to establish good cause for failure to timely serve original complaint. Fed.Rules Civ.Proc.Rule 4(j), 28 U.S.C.A.

4. Federal Civil Procedure Key 2721

Rule 11 sanctions could be imposed against plaintiff whose attorney admitted that he did not conduct factual inquiry allowing him to plead claims with sufficient particularity until after original complaint was filed, particularly in light of plaintiff's admission that pleading was filed to coincide with sentencing of one of the defendants and that plaintiff made absolutely no effort to serve complaint until after it was filed, suggesting complaint was filed solely to attract publicity and to harass defendants. Fed.Rules Civ. Proc.Rule 11, 28 U.S.C.A.

Larry Delano Coleman, Larry Delano Coleman, P.C., Kansas City, Mo., for plaintiff.

Joe W. Coleman, McDowell, Rice & Smith; Bruce C. Houdek, James, Millert, Houdek, Tyrl & Sommers; David Field Oliver, Smith, Gill, Fisher & Butts, Kansas City, Mo., for defendants.

ORDER

STEVENS, District Judge.

Plaintiff filed this lawsuit pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964, alleging that defendants engaged in a pattern of racketeering activity to deprive plaintiff of her interest in

certain personal property devised to her by Arthur Byant, the legendary Kansas City barbecue restaurateur. The case is currently before the court on the motion of defendants[1] to dismiss plaintiff's complaint for failure to serve it in a timely fashion or, alternatively, for failure to prosecute; defendants' motion for sanctions pursuant to Fed.R.Civ.P. 11; and defendants' motion to quash the purported service of plaintiff's amended complaint. In addition to defendants' motions, plaintiff has filed a motion for default judgment and for sanctions against defendant David Schlee.

I. Motion to Dismiss

Plaintiff filed her complaint on July 28, 1989. In support of their motion to dismiss, defendants argue that plaintiff made absolutely no effort to serve the complaint within the 120 day period provided in Fed.R.Civ.P. 4(j). Indeed, plaintiff concedes this fact in her Suggestions in Opposition to the Motions to Dismiss, dated December 13, 1989,[2] where she states that "[t]here is no question but that the complaint filed on July 28, 1989 has not been served." Fed.R.Civ.P. 4(j) provided that

> [i]f a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice. . . .

Thus, unless plaintiff can establish that there was "good cause" for her failure to serve the complaint within the 120 day period, defendants' motion must be granted.

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1 Actually, several different motions were filed, each containing the same argument. One motion was filed by defendants Preston Kerr and Judith J. Kerr, one by defendants Brooklyn Barbeque Corporation, William Rauschelbach, Sandra Rauschelbach, and Gary Berbiglia, one by Stockyards Preservation Co., and one by David Schlee. Only defendant Arthur Bryant's Inc. has failed to file a motion to dismiss. Since the motions concern identical issues, the court will refer only to one motion.

2 December 13, 1989 is 138 days after the complaint was filed.

The 120 day limitation contained in Fed.R.Civ.P. 4(j) "is intended to force parties and their attorneys to be diligent in prosecuting their cause of action. . . ." *Townsel v. Contra Costa County, California*, 820F.2d319, 320 (9th Cir.1987) (quoting *Wei v. State of Hawaii*, 763 F.2d 370, 373 (9th Cir.1985). *See also Motsinger v. Flynt*, 119 F.R.D. 373, 375 (M.D.N.C.1988) ("Rule 4(j) is specifically designed to encourage and prod counsel into expediting service in order that the merits of the case may be reached."); *Baden v. Craig-Hollum, Inc.*, 115 F.R.D. 582, 584 (D.Minn.1987) ("the purpose of Rule 4(j) is to force parties and their attorneys to be diligent in prosecuting their causes of action"); *Boykin v. Commerce Union Bank of Union City, Tennessee*, 109 F.R.D. 344, 345 (W.D.Tenn. 1986) (legislative history of the amendment adding 120 day period to Rule 4(j) establishes that purpose of the rule is to "encourage prompt movement of civil actions in the federal courts").

In the instant case plaintiff argues that the complaint should not be dismissed because good cause exists for not accomplishing service within the 120 day period. Specifically, plaintiff argues that

> the RICO [complaint] has not been served, because counsel intends to file a first amended complaint within two weeks of the filing date of this response, sufficient information having been gathered to plead with particularaly (sic) the averments needed to establish antitrust violations securities fraud, common law fraud, Civil RICO, and other causes of action. . . .

Suggestion in Opposition to Defendants' Motions to Dismiss at ¶ 11. Plaintiff also notes that the complaint was not filed within the 120 day period because of the "sheer massiveness" of the facts underlying the complaint and because it "was filed to coincide with the sentencing of the brilliant, though malevolent, Preston Kerr, the principal owner of the Stock Yard [sic] Preservation Company. . . ." [3]

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3 Both Kerr and Stockyard Preservation Co. are defendants in the instant case.

In addition to arguing that "good cause" exists for failure to serve the complaint within 120 days, plaintiff maintains that the complaint should not be dismissed because she filed a first amended complaint on December 28, 1989.[4] Several defendants have been served with the amended complaint and have filed motions to quash service, arguing that the amended complaint was not properly served since no effort had been made to serve the original complaint within the 120 day period provided under Fed.R.Civ. P. 4(j).

As an initial matter, the court concluded that plaintiff has not established the "good cause" necessary to overcome defendants' motion to dismiss the original complaint for failure to serve it in a timely manner. *See Ouzts v. Cummins*, 825 F.2d 1276, 1278 (8th Cir.1987). Although neither the language of the rule nor its legislative history define "good cause," most courts applying the term have found that good cause will be found only if plaintiff has been diligent in attempting to serve the complaint. The "inadvertence of counsel does not qualify as good cause." *Baden*, 115 F.R.D. at 586. Thus, "[l]ack of effort or half-hearted efforts on the part of a plaintiff [to serve the complaint] will likely lead to dismissal." *Motsinger*, 119 F.R.D. at 376, n.2.

[1] In the instant case plaintiff admits she made no attempt to serve defendants within the 120 day period because she knew she would ultimately file an amended complaint containing more specific factual allegations. In a case with similar facts, the Ninth Circuit held that a plaintiff's "desire to amend [her] complaint before effecting service does not constitute good cause." *Wei v. State of Hawaii*, 763 F.2d 370, 372 (9th Cir.1985).

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4 Plaintiff filed a motion for leave to file the fist amended complaint on December 13, 1989. That motion was never ruled by the court but the Clerk's Office filed the amended complaint on December 28, 1989. Plaintiff argues that the amended complaint was correctly filed, without a ruling on the motion for leave, because Fed.R.Civ.P. 15(a) provides that a party may amend a pleading "once as a matter of course at any time before a responsive pleading is served. . . ." As the court's discussion, *infra* at 668-69, indicates the reasoning of plaintiff's argument is flawed in a situation such as this one, where the original complaint was not timely served, rendering Fed.R.Civ.P. 15(a) inapplicable.

[2] Plaintiff also argues that defendants' motion should be denied because plaintiff was not prejudiced by the delay. Even assuming, *arguendo*, that defendants did not suffer any prejudice by having a complaint on file alleging that they participated in racketeering activities, this court would reject plaintiff's argument because "the absence of prejudice is *not* of aid to a faulty plaintiff who presents no justifiable reason for his lack of diligent and timely conformance with . . . Rule 4(j)." *Quann v. Whitegate-Edgewater*, 112 F.R.D. 649, 660 D.Md.1986) (emphasis in original). *Accord Baden*, 115 F.R.D. at 586, n.4 (neither language of rule nor its legislative history requires a showing of prejudice). Even those courts finding that a prejudice inquiry is relevant, however, have held that "the plain language of Rule 4(j) leaves no room for excusing untimely service where there is total failure to show good cause." *Delicata v. Bowen*, 116 F.R.D. 564, 566 (S.D.N.Y.1987). Thus, even if this court found that an inquiry into whether defendants were prejudiced by the delay in service was relevant the court would not engage in such an inquiry since plaintiff has not established good cause for the delay.

[3] Having found that good cause does not exist for the delay in serving the defendants with the original complaint, the court must next determine what effect, if any, the filing of the amended complaint more than 120 days after the filing of the original complaint has on defendants' motion to dismiss. Plaintiff relies on *Ahmad v. Independent Order of Foresters*, 81 F.R.D. 722 (E.D.Pa.1979), *aff'd without opinion*, 707 F.2d 1399 (3rd Cir.1983), in support of her argument that her claims are not barred by the failure to serve the original complaint within the 120 day period. Specifically, plaintiff argues that her claims may not be dismissed since she later successfully served the amended complaint.

Plaintiff in *Ahmad* filed his complaint on June 27, 1975. *Id.* at 725. Although a special process server was appointed five days later, he never succeeded in serving defendant. *Id.* Plaintiff's attorney then withdrew from the case and, while substitute counsel was ultimately obtained, it was

March 8, 1977 before the amended complaint was filed. *Id.* Defendant moved to dismiss the amended complaint arguing that it should not have been filed without leave of court since the original complaint was never served. *Id.* at 726. The court rejected this argument, noting that under Fed.R.Civ.P. 15(a) a party had the opportunity to amend its complaint once as a matter of course at any time before a responsive pleading had been filed. *Id.*

Ahmad is distinguishable from the instant case, however, since it was decided prior to the 1983 amendment to Fed.R.Civ.P. 4(j), adding the 120 day limit on serving a complaint. Thus, unlike plaintiff in the instant case, plaintiff in *Ahmad* was under no time constraint to serve his original complaint. Since the 1983 amendment to Fed.R.Civ.P. 4 (j) took effect, courts considering whether a plaintiff may serve an amended complaint outside of the 120 day limit have uniformly held that the amended complaint may not be served unless good cause is shown for the failure to serve the original complaint within the 120 day period. *See e.g., Smith v. Pennsylvania Glass Sand Corp,* 123 F.R.D. 648, 650 (N.D.Fla.1988) ("after the Rule 4(j) 120 day period has expired, a trial judge may grant an extension of time to serve a complaint only when the party has satisfied Rule 4(j)'s good cause requirement"); *Baden,* 115 F.R.D. at 586, n.3 amended complaint does not toll the 120 day period as to previously named defendants and "[t]he appropriate course is for plaintiff to amend the original complaint after serving it upon the original defendants"); *Boykin,* 109 F.R.D. at 350 (extension of time in which to serve complaint after 120 day period has expired will be granted only if moving party establishes good cause for the failure to comply with Fed.R.Civ.P. 4(j)).

This interpretation[5] of the good cause requirement of Fed.R.Civ.P. 4(j) comports with common sense: if a plaintiff

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5 Courts have reached this result after comparing the "good cause" language of Rule 4(j) with Fed.R.Civ.P. 6(b), which provides that a court may grant an enlargement of time to perform an act after the allotted time has expired "where the failure to act was the result of excusable neglect." The courts have concluded that the excusable neglect standard must at least equal the good cause language or the 120 day time limitation would lose all meaning. *See, e.g., Baden,* 115 F.R.D. at 585, n.2; *Delicata,* 116 F.R.D. at 566.

who had not shown good cause for failing to serve a complaint with the 120 day period was allowed to file an amended complaint after that time period had passed, there would be no incentive to serve the complaint in a timely manner and the purpose of Fed.R.Civ.P. 4(j), to encourage prompt service, would be emasculated. Consequently, this court concludes that plaintiff's attempt to file and serve her amended complaint after the 120 day period had passed does not preserve her original cause of action and service of the amended complaint must be quashed.

II. Motion for Sanctions

Defendants also seek sanctions against plaintiff and her attorney, pursuant to Fed.R.Civ.P. 11, for having to respond to plaintiff's original complaint. Specifically, defendants argue that the original complaint, filed on July 28, 1989, was filed for the sole purpose of harassing defendants and did not have a reasonable basis in law or in fact. Fed.R.Civ.P. 11 requires that a court assess sanctions if a pleading, motion or other paper is signed by an attorney or party and is not well grounded in fact or warranted by existing law or if it is "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in cost of litigation." Fed.R.Civ.P. 11.

Defendants argue that sanctions must be awarded in this case because plaintiff admits that the plaintiff chose to file the complaint so that it would coincide with the sentencing of Preston Kerr, a defendant in this case, and because plaintiff admits that it was not until after the original complaint was filed and the amended complaint was being contemplated that plaintiff had gathered sufficient information to plead with particularity the requisite elements of a RICO or antitrust claim. *See* Plaintiff's Suggestions in Opposition to the Motion to Dismiss at ¶4, 11. Defendants conclude that the only inference that may be drawn from these admissions is that plaintiff filed the original complaint for the sole purpose of garnering publicity favorable to her cause and that plaintiff's attorney did not conduct sufficient research prior to filing the original complaint to determine if the allegations were well grounded in fact.

This court has recently noted that "[i]n determining whether an award of sanctions is appropriate . . . [a] court must consider 'whether the person who signed the pleading conducted a reasonable inquiry into the facts and law supporting the pleading.' " *Naylor v. Lee's Summit Reorganized School District R-7,* 703 F.Supp. 803, 820 (W.D.Mo.1989) (quoting *O'Connell v. Champion International Corp.,* 812 F.2d 393, 395 (8th Cir.1987)). This inquiry is objective, rather than subjective. *Equal Employment Opportunity Commission v. Milavetz and Associates, P.A.,* 863 F.2d 613, 615 (8th Cir.1988). Since the rule requires the individual signing the document to conduct a reasonable inquiry, a party filing a complaint hoping that discovery will reveal facts supporting the allegations may be sanctions. *Balfour Guthrie, Inc. v. Hunter Marine Transport, Inc.,* 118 F.R.D. 66, 74 (M.D.Tenn.1987). *See also Nassau-Suffolk Ice Cream, Inc. v. Integrated Resources, Inc.,* 114 F.R.D. 684, 689 (S.D.N.Y.1987) (Rule 11 requires the court to impose sancions "[w]hen it is obvious from the inadequacies of the proposed pleading that plaintiff's counsel engaged in little or no preliminary factual and legal investigation before filing a proposed pleading"). Similarly, "[b]lind reliance on the client is seldom a sufficient inquiry" and sanctions will be imposed if counsel does not take the time to make an inquiry of his own. *Southern Leasing Partners, Ltd. v. McMullan,* 801 F.2d 783, 788 (5th Cir.1986). *Accord Fleming Sales Co., Inc. v. Bailey,* 611 F.Supp. 507, 519 (N.D.Ill.1985) (lawyers have a responsibility to confer with their clients as to the facts "and not to accept the client's version on faith, but to probe the client in that respect ('reasonable inquiry')").

[4] The instant case had obviously not proceeded to a stage where the court can determine, based on its own examination of the facts, whether the original complaint was warranted. Plaintiff's attorney has admitted, however, that it was not until after the original complaint was filed that he conducted a factual inquiry allowing him to plead plaintiff's claims with sufficient particularity.[6] Thus, the state-

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6 The court believes this point is especially important in the instant case, where fraud and criminal activity are alleged. Although plaintiff may have had an "idea" that the claims were warranted, a complaint alleging fraud may be dismissed if not pled with sufficient particularity. *See* Fed.R.Civ.P. 9(b).

ments contained in Plaintiff's Suggestions in Opposition to Defendants Motion to Dismiss are essentially admissions of violations of Fed.R.Civ.P. 11.

Even if, however, the court found that plaintiff had established that a reasonable basis existed for the filing of the original complaint, the court would find that sanctions must be assessed based on the Rule 11 language prohibiting the filing of a pleading for an improper purpose. As noted earlier, plaintiff admits that the pleading was filed to coincide with the sentencing of one of the defendants and that plaintiff made absolutely no effort to serve the complaint after it was filed. From these two admissions the court can reasonably conclude that the complaint was filed solely to attract publicity to plaintiff's claims and to harass defendants, and not because plaintiff's attorney had conducted an inquiry revealing that the claims had a reasonable basis in law or in fact.

Indeed, the mere fact plaintiff filed a complaint without attempting to serve it within the 120 day period constitutes evidence that Rule 11 sanctions are appropriate. In *Ordower v. Feldman*, 826 F.2d 1569 (7th Cir.1987), the Seventh Circuit affirmed the district court's award of Rule 11 sanctions when plaintiffs did not serve defendants until more than 150 days after filing their complaint. *Id.* at 1570. Like plaintiff in the instant case plaintiffs in *Ordower* attempted to serve defendants after the 120 day service period of Fed.R.Civ.P. 4(j) had expired. The appellate court affirmed the district court's finding that "plaintiffs vexatiously and unreasonably multiplied the proceedings by serving [defendant] even though [they] must have been aware that [defendant] would move to dismiss under Rule 4(j). . . ." *Id.* at 1574.

The fact that plaintiff's filing of the complaint harassed defendants also warrants Rule 11 sanctions. *See, e.g., Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir.1986); *Teradyne, Inc. v. Clear Communications Corp.*, 707 F.Supp. 353, 357 (N.D.Ill.1989). In the instant case the court concludes that plaintiff's failure to attempt service within the 120 day period combined with plaintiff's attorney's admissions that the majority of his inquiry into the facts and

law surrounding this case did not occur until he began drafting the amended complaint, justifies the imposition of Rule 11 sanctions. Although defendants' attorneys have filed affidavits detailing the fees and costs incurred as a result of the filing of the instant lawsuit, the court will not make a specific sanction award until plaintiff's attorney has had an opportunity to respond to the material contained in those affidavits. Accordingly, it is

ORDERED that defendants' motion to dismiss for failure to serve plaintiff within 120 days are granted. This case is dismissed without prejudice. It is further

ORDERED that defendants' motion for Rule 11 sanctions are granted. It is further

ORDERED that plaintiff's attorney respond to the affidavits submitted by defendants' counsel within fifteen days of the date of this order. It is further

ORDERED that defendants' motion to quash service of the amended complaint are granted. It is further

ORDERED that plaintiff's motion for default judgment against defendant David Schlee is denied. It is further

ORDERED that plaintiff's motion for sanctions against defendant David Schlee is denied.

APPENDIX E

RULE 35. ASSIGNMENT OF CASES

Unless otherwise provided in an Administrative Order approved by the Court en banc, the assignment of newly filed criminal and civil matters shall be by blind draw among the qualified judges. Judges shall be considered qualified unless they have given blanket recusal instructions to the Clerk in writing. However, any judge may enter an order in any case at the request of or in the event of unavailability of the judge to whom the case is assigned. Cases may be transferred between judges by mutual consent. Cases on a joint trial docket may be reassigned in order to promote their prompt and efficient disposition. If a case that has been dismissed is refiled, the refiled case shall be assigned to the judge last handling the dismissed case. Related cases, by mutual consent of the judges to whom the cases are assigned, shall be transferred to the judge with the lowest numbered case.

(Adopted Aug. 17, 1988, effective Aug. 17, 1988.)

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-208

DORETHA BRYANT
Petitioner,

vs.

BROOKLYN BARBECUE CORPORATION, et. al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner.

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including October 15, 1991.

/s/ HARRY A. BLACKMUN
Associate Justice of the Supreme
Court of the United States

Dated this 18th day
of September, 1991.

(2)

No. 91-643

Supreme Court, U.S.
FILED
NOV 15 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

DORETHA BRYANT

Petitioner,

vs.

BROOKLYN BARBECUE CORPORATION, et al.

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTIONS PRESENTED FOR REVIEW

The following questions, rather than those questions identified by Petitioner, would be presented for review in this case:

1. Whether the District Court committed an abuse of discretion when it imposed sanctions against Petitioner's counsel pursuant to Rule 11, Federal Rules of Civil Procedure, based upon its conclusion formed by counsel's admissions that he failed to conduct a reasonable inquiry of the facts and law prior to filing the original Complaint and that he filed the original Complaint for an improper purpose, namely, to coincide with the unrelated criminal sentencing of one of the named Respondents?

2. Whether the District Court committed error in imposing sanctions, pursuant to Rule 11, Federal Rules of Civil Procedure, despite lack of service of the original Complaint and Summons upon any of the Respondents?

3. Whether the District Court committed error in awarding sanctions, pursuant to Rule 11, Federal Rules of Civil Procedure, to Respondents' respective counsel?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

PERCEIVED MISSTATEMENTS OF FACT AND CASE 1

REASONS FOR DENYING THE WRIT 2

I. There Are No Important Issues Of Federal Law Unresolved And There Is No Basis For *Certiorari* Under The Applicable Clearly Erroneous/Abuse Of Discretion Standard Of Review 2

A. Failure To Comply With Rule 14(e) And Deficiencies Of The Petition 4

B. Standard Of Review Of Rule 11 Sanctions 5

C. *Willy* Does Not Support The Granting Of *Certiorari* 7

D. Eighth Circuit's Opinion Does Not Conflict With Applicable Decisions Of This Court 8

II. The District Court's Imposition Of Sanctions Fully Satisfied The Requirement of Rule 11 And Does Not Constitute An Abuse Of Discretion 10

III. The District Court Properly Interpreted Rule 11 When It Imposed Sanctions Against Petitioner's Counsel, Despite The Lack Of Service Of The Original Complaint And Summons Upon Any Of The Respondents, And When It Awarded Such Sanctions directly To Respective Counsel For Respondents, As Opposed To Respondents 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES:

Anderson v. Bessemer City, 470 U.S. 564 (1985) 6

Balfour Guthrie, Inc. v. Hunter Marine Transport, Inc., 118 F.R.D. 66 (M.D. Tenn. 1987) 5, 11

Barlow v. McLeod, 666 F.Supp. 222 (D. D.C. 1986), *aff'd* 861 F.2d 303 (D.C. Cir. 1988) 5, 11

Brown v. National Board of Medical Examiners, 800 F.2d 168 (7th Cir. 1986) 14

Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. ___, 111 S.Ct. 922 (1990) 8

Chambers v. NASCO, Inc., 500 U.S. ___, 111 S.Ct. 2123 (1991), *reh. denied*, 112 S.Ct. 12 (1991) 8

Cooter & Gell v. Hartmarx Corp., 496 U.S. ___, 110 S.Ct. 2447 (1990) 5, 7, 16, 18

Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987) 13, 14

Equal Employment Opportunity Commission v. Milavetz and Associates, P.A., 863 F.2d 613 (8th Cir. 1988) 9

Fleming Sales Co., Inc. v. Bailey, 611 F.Supp. 507 (N.D. Ill. 1985) 11

Gaiardo v. Ethyl Corp., 835 F.2d 479 (3d Cir. 1987) 18

In re Kunstler, 914 F.2d 505 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 1607 (1991) 9, 13, 15

INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc., 815 F.2d 391 (6th Cir. 1987), *cert. denied*, 484 U.S. 927 (1987) 13

TABLE OF AUTHORITIES – Continued

Page

Nassau-Suffolk Ice Cream, Inc. v. Integrated Resources, Inc., 114 F.R.D. 684 (S.D. N.Y. 1987) .10, 11

Naylor v. Lee's Summit Reorganized School District R-7, 703 F.Supp. 803 (W.D. Mo. 1989) 11

Oliveri v. Thompson, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987) 13, 14, 15

Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 110 S.Ct. 456 (1989) 9, 10

Peth v. Breitzman, 611 F.Supp. 50 (E.D. Wis. 1985) 18

Rodgers v. Lincoln Towing Service, Inc., 771 F.2d 194 (7th Cir. 1985) 14

Saine v. A.I.A., Inc., 582 F.Supp. 1299 (D. Colo. 1985) 5

Seven-Up Bottling Co. v. Seven-Up Co., 420 F.Supp. 1246 (E.D. Mo. 1976), *aff'd*, 561 F.2d 1275 (8th Cir. 1977) 9, 15

Stinson v. American Sterilizer Co., 127 F.R.D. 689 (M.D. Ala. 198) 16

Szabo Food Services, Inc. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987), *cert. dismissed*, 485 U.S. 901 (1988) 16, 17, 18

Tom Growney Equipment, Inc. v. Shelley Irrigation Development, Inc., 834 F.2d 833 (9th Cir. 1987) 15

Willy v. Coastal Corporation, 915 F.2d 965 (5th Cir. 1990) *reh. denied*, 920 F.2d 931 (5th Cir. 1990), *cert. granted in part*, 111 S.Ct. 2824 (1991) ..2, 7, 8, 18

TABLE OF AUTHORITIES – Continued

Page

Wojan v. General Motors Corp., 851 F.2d 969 (7th Cir. 1988) 17

FEDERAL RULES OF CIVIL PROCEDURE

Rule 4(j) 1, 4, 12, 13

Rule 5 18

Rule 11 ..... *passim*

SUPREME COURT RULES:

Rule 10 ..... 2, 4, 10

Rule 14(e) 4

PERCEIVED MISSTATEMENTS OF FACT AND CASE

1. The third of Petitioner's "Questions Presented For Review" misstates one of the bases for the District Court's imposition of Rule 11 sanctions. While Respondents' Motion to Dismiss requested sanctions be imposed due to Petitioner's failure to comply with the 120 day service requirement of Rule 4(j), the District Court's imposition of sanctions was based upon judicial admissions by the Petitioner's counsel (contained in a responsive pleading to the Motion to Dismiss) that (a) he had not conducted a reasonable inquiry of law and fact prior to filing the original Complaint *and* (b) that the original Complaint had been filed to coincide with the unrelated criminal sentencing of one of the Respondents. Thus, the District Court concluded the original Complaint had been filed both without prior reasonable inquiry and for an improper purpose, namely to attract publicity and to harass the Respondents. (A copy of the March 14, 1990 Order of The Honorable Joseph E. Stevens, Jr., United States District Judge for the Western District of Missouri is appended to Petitioner's Petition for Writ of Certiorari ("Petition") at Appendix D. A copy of the May 15, 1990 Order itemizing the sanction award is appended here as Appendix 1.)

2. The fourth of Petitioner's "Questions Presented For Review" is inappropriate for consideration in this Petition as it refers only to the propriety of the District Court's dismissal of the original Complaint as a basis for the imposition of sanctions. This proposition misstates the District Court's basis for imposing sanctions. Further, Petitioner did not preserve this issue on appeal to the United States Court of Appeals for the Eighth Circuit. In

fact, the Eighth Circuit noted in its April 29, 1991 opinion that Petitioner did not challenge the dismissal of the action on appeal. (A copy of the April 29, 1991 opinion of the United States Court of Appeals for the Eighth Circuit is appended to Petitioner's Petition at Appendix B.)

3. Petitioner's reference to the Orders of the District Court indicates that the same were entered "without the benefit of any kind of hearing, at any time, on any subject". This reference infers that a hearing was requested. At no time did Petitioner nor Petitioner's counsel ever request such a hearing. To indicate otherwise is to mislead this Court.

REASONS FOR DENYING THE WRIT

I. There Are No Important Issues Of Federal Law Unresolved And There Is No Basis For *Certiorari* Under The Applicable Clearly Erroneous/Abuse Of Discretion Standard Of Review.

Petitioner asserts *certiorari* review is warranted based upon the opinion of *"Donald J. Willy, Petitioner v. Coastal Corporation, et al.*, No. 90-1150, 501, U.S. ___, 115 L.Ed 2d 994 (August 1991)"[1] and pursuant to Rule 10.1(c), Supreme Court Rules. Respondents maintain, as more fully discussed below, no such basis for *certiorari* review exists. Further, Respondents have reframed the "Questions Presented For Review" to clarify for this Court the

[1] As cited by Petitioner in her Petition.

issues which were properly decided by the District Court and affirmed by the Eighth Circuit Court of Appeals.

Notwithstanding Petitioner's creative statement of "Questions Presented for Review", the actual questions on appeal are alarmingly simply: (1) whether the District Court abused its discretion in awarding Rule 11 sanctions after concluding that Petitioner's counsel failed to conduct a reasonable inquiry prior to filing the original Complaint and that such filing occurred for an improper purpose; and (2) whether the District Court's award of Rule 11 sanctions to Respondents' respective counsel, despite lack of service of the original Complaint and Summons, was clearly erroneous.

The District Court imposed Rule 11 sanctions against Petitioner's counsel because he effectively admitted that he had not conducted the "reasonable inquiry" required by Rule 11 before the original Complaint was filed and further admitted that the original Complaint had been filed to coincide with the criminal sentencing of one of the Respondents, which was an improper purpose. (Petitioner's Appendix B3.) (A copy of the admissions of Petitioner's counsel contained in the pleading entitled "Plaintiff's Suggestions in Opposition to Motions to Dismiss; and Motion for Leave to File And Serve First Amended Complaint", filed with the District Court on December 13, 1989 ("Suggestions") is appended hereto at Appendix 2.) The Eighth Circuit correctly identified that the sole issue for consideration on appeal was the District Court's imposition of Rule 11 sanctions. The Eighth Circuit further clarified that the Petitioner did not challenge the dismissal of the action (based upon failure to comply

with the 120 day service requirement set forth in Rule 4(j), Federal Rules of Civil Procedure) in the appeal. (Petitioner's Appendix B3.)

A. Failure To Comply With Rule 14(e) And Deficiencies Of The Petition

As a preliminary matter, Respondents note that Petitioner fails to comply with the requirements of Rule 14(e), Supreme Court Rules, in that she makes no concise statement in her Petition as to the grounds on which the Jurisdiction of this Court is invoked for consideration governing review on writ of *certiorari*, namely those grounds set forth in Rule 10, Supreme Court Rules. Neither could such a representation be made in good faith as the Court of Appeals did not address or resolve an important question of federal law nor did it decide a federal question in conflict with decisions of this Court.

Additional deficiencies of the Petition are further noted: Petitioner's first two "Questions Presented for Review" relate to issues recently resolved by this Court. The third of those Questions is a misstatement of the District Court's basis for imposing Rule 11 sanctions. Petitioner is estopped from presenting the fourth of the Questions as she failed to preserve such issue on appeal to the Eighth Circuit. Further, Petitioner's citation to three opinions of this Court as reasons for granting the writ under Rule 10, Supreme Court Rules, incorrectly summarizes the questions of federal law decided therein.

The Petition attempts to make this case into something that it is not, rather than presenting the case for what it is: an attempt at a second appeal raising the issues

of whether the District Court's findings that the original Complaint was filed for an improper purpose and filed without reasonable pre-filing inquiry into the law and facts were an abuse of discretion and whether its award of Rule 11 sanctions was clearly erroneous. Petitioner has had her appeal; the presentation of this case to this Court as one for which *certiorari* should issue is inappropriate and ill serves the Petitioner and this Court.

B. Standard Of Review Of A District Court's Imposition Of Rule 11 Sanctions

The authority of a District Court to impose Rule 11 sanctions of attorneys' fees, incurred in defense of an action filed without a prior reasonable inquiry as to law and fact or for an improper purpose, is well established in law. *Balfour Guthrie, Inc. v. Hunter Marine Transport, Inc.*, 118 F.R.D. 66, 74 (M.D. Tenn. 1987). *See also Barlow v. McLeod*, 666 F.Supp. 222 (D. D.C. 1986); *Saine v. A.I.A., Inc.*, 582 F.Supp. 1299 (D. Colo. 1985). Rule 11 states, in part, "If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, *shall* impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . ". [Emphasis added.]

In *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. ___, 110 S.Ct. 2447, 2459 (1990), this Court applied the clearly erroneous/abuse of discretion standard of review to a Rule 11 award, stating "[f]amiliar with the issues and litigants, the District Court is better situated than the court of appeals to marshall the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11".

The Court further stated "[i]n practice, the 'clearly erroneous' standard required the appellate court to uphold any District Court determination that falls within a broad range of permissible conclusions". *Id.* at 2458 (citing *Anderson v. Bessemer City,* 470 U.S. 564, 573-74 (1985)) ("If the District Court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous".). This same deferential standard must apply to the review of an award of Rule 11 sanctions based upon the Petitioner's counsel's filing of the original Complaint for an improper purpose and without conducting a reasonable inquiry into the law and facts prior to filing.

In the present case, the Eighth Circuit needed no such deferential standard to affirm the Rule 11 sanctions award. The Court held that there was no abuse of discretion by the District Court and affirmed that court's conclusion "from the papers counsel had filed . . . that counsel knew he had not conducted a reasonable inquiry of the facts and the law prior to filing the original Complaint, but filed it prematurely so as to benefit from the publicity generated by [Respondent] Preston Kerr's criminal sentencing on charges relating to bank fraud" thus, affirming the imposition of Rule 11 sanctions. (Petitioner's Appendix B4.)

C. *Willy* Does Not Support the Granting Of *Certiorari*

In her Petitioner, Petitioner represents to this Court this *certiorari* should be granted in this case for the same reasons it was granted in "*Donald J. Willy, Petitioner v. Coastal Corporation, et al.*, No. 90-1150, 501, U.S. ___, 115 L.Ed. 2d 994 (August 1991)" (case below cited at 915 F.2d 965 (5th Cir. 1990)). In fact, *Willy* has a much more detailed history than that cited in Petitioner's Petition. In sum, however, *Willy* affirms the proposition that is set forth in the seminal case on Rule 11 sanctions, *Cooter & Gell v. Hartmarx Corp., supra*, that being that Rule 11 sanctions are available even when the District Court that imposed them was without subject matter jurisdiction. *Willy*, 915 F.2d at 967.

In *Willy*, Willy moved to remand an action which had been removed to federal court by the defendant based upon federal question jurisdiction. In response to the defendant's Rule 12(b)(6) motion to dismiss, Willy filed a 110-page motion for summary judgment and submitted "1200 pages of unindexed, unorganized supporting material". *Willy*, 915 F.2d at 966. After two separate hearings, the District Court granted the defendant's motion to dismiss and motion for Rule 11 sanctions against Willy and his attorney.[2] The sanctions were imposed for the "filing

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[2] In her Petition, Petitioner misquotes the opinion in *Willy* which may give this Court the illusion that two separate evidentiary hearings were held on the Rule 11 sanctions issue before sanctions were imposed against Willy and his attorney. There is nothing in the reported opinion which supports such an illusion.

of misleading and ill founded pleadings, the use of the discovery process to harass opposing parties, repeated references to non-existent allegations of conflicts of interest, and the filing of the infamous 110-page summary judgment motion accompanied by reams of irrelevant and unorganized material". *Willy*, 915 F.2d at 966, n.3.

Petitioner asserts that because this Court granted *certiorari* in part in *Willy*, *certiorari* should be granted here. Fault with this assertion is two-fold: 1) the instant case and *Willy* are factually distinguishable, and 2) the basis for which *certiorari* was granted in part in *Willy* is unreported and therefore, cannot be relied upon by Petitioner.

D. Eighth Circuit's Opinion Does Not Conflict With Applicable Decisions Of This Court

After referencing *Willy* as grounds for *certiorari* review, Petitioner then cites to three decisions of this Court which she maintains are in conflict with the Eighth Circuit's affirmation of the District Court's ruling mandate the *certiorari* review of the Eighth Circuit's opinion under Rule 10, Supreme Court Rules. Reliance on any one of these three decisions is misplaced.

In referencing the two opinions of *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. ___, 111 S. Ct. 922 (1991) and *Chambers v. NASCO, Inc.*, 501 U.S. ___, 111 S.Ct. 2123, (1991). Petitioner continues to misstate the basis for the District Court's imposition of Rule 11 sanctions. The District Court did not conclude that the original Complaint was filed for an "improper purpose" based upon Petitioner's attorney's failure to

serve the pleading within 120 days after filing nor did it make an independent determination from a review of the pleading that it was not "well founded" and "baseless". Instead, the District Court concluded an "improper purpose" existed for filing based upon the admissions of Petitioner's counsel contained in the Suggestions.[3] Though "improper purpose" for purposes of Rule 11 sanctions involves an objective standard, *Equal Employment Opportunity Commission v. Milavetz and Associates, P.A.*, 863 F.2d 613, 615 (8th Cir. 1988), "it is appropriate to consider the signer's subjective beliefs to determine the signer's purpose in filing suit, if such beliefs are revealed through an admission that signer knew that the motion or pleading was baseless but filed it nonetheless. This evidence may be said to be "objective" in the sense that it can be viewed by a court without fear of misinterpretation; it does not involve difficult determinations of credibility". *In re Kunstler,* 914 F.2d 505, 519 (4th Cir. 1990).

Petitioner's representations as to the third decision, *Pavelic & LeFlore v. Marvel Entertainment Group,* 493 U.S. ___, 110 S.Ct. 459 (1989), is shocking as the opinion does not even *remotely* pertain to the proposition assigned to it by Petitioner in her Petition. *Pavelic* determined that Rule 11 did not authorize a District Court to impose a sanction against the law firm of the individual attorney who signed the pleading as the rule connotes sanctions only

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[3] Admissions made in pleadings during the course of a case are judicial admissions binding on the party making them. *Seven-Up Bottling Co. v. Seven-Up Co.*, 420 F. Supp. 1246, 1251 (E.D. Mo. 1976), *aff'd*, 561 F.2d 1275 (8th Cir. 1977).

against the individual signer and not the juridical person on whose behalf the paper was signed. *Pavelic, id.*, at 445.

As such, Petitioner provides no basis for the granting of *certiorari* under the clearly erroneous/abuse of discretion standard of review or under Rule 10, Supreme Court Rules. Even if *certiorari* were granted, as discussed below, there is no argument to be made to reverse the Eighth Circuit's affirmation of the District Court's ruling. The District Court's ruling and the Eighth Circuit's affirmation of that ruling are clearly in accord with the applicable decisions of this Court.

II. The District Court's Imposition of Sanctions Fully Satisfied the Requirement of Rule 11 and Does Not Constitute An Abuse of Discretion.

Rule 11, Federal Rules of Civil Procedure, provides in relevant part that the attorney's signature on any pleading certifies

> that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for extension, modification, or reversal of existing law, and that it is not interposed for any improper purposes, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

Rule 11 requires more of counsel than regurgitating the allegations of a client. A plaintiff's counsel has both an ethical and a statutory obligation not to accept the client's version of the facts alone. *See Nassau-Suffolk Ice*

Cream, Inc. v. Integrated Resources, Inc., 114 F.R.D. 684, 689, 690-91 (S.D. N.Y. 1987); *Fleming Sales Co., Inc. v. Bailey*, 611 F.Supp. 507, 519 (N.D. Ill. 1985). Since Petitioner's counsel admits he had not sufficiently investigated the RICO claim prior to filing the original Complaint, he could only have relied upon the information provided by the client to substantiate Petitioner's claims.

Further, since Petitioner's counsel, by his own admissions, did not possess the numerous documents regarding his client's alleged claims prior to filing the original Complaint, Petitioner's counsel did not have sufficient facts to guide his legal research. A complaint "woefully lacking in details", and consisting "almost entirely of conclusory allegations", "implicat[ing] anyone even tangentially related to the transactions", and with "mere blanket references to defendants and no specifics" as to particular defendants earns Rule 11 sanctions. *See Barlow v. McLeod, supra.*

The District Court noted in its March 14, 1990 Order, that "[i]n determining whether an award of sanctions is appropriate . . . [a] court must consider whether the person who signed the pleading conducted a reasonable inquiry into the facts and law supporting the pleading", citing to *Naylor v. Lee's Summit Reorganized School District R-7*, 703 F.Supp. 803, 820 (W.D. Mo. 1989). The District Court further noted that since Rule 11 requires the individual signing the document to conduct a reasonable inquiry, a party filing a complaint hoping that discovery will reveal facts supporting the allegations may be sanctioned, citing to *Balfour Guthrie, Inc., supra* at 74, and *Nassau-Suffolk Ice Cream, Inc., supra* at 689.

Another requirement imposed by Rule 11 upon the signer of a pleading is that the pleading not be "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needlessly increase the cost of litigation". The District Court found that Petitioner's counsel, again by his own admissions, filed this action for an improper purpose, specifically, that "[t]he Complaint herein was filed to coincide with the sentencing of . . . [respondent] Preston Kerr". (Petitioner's Appendix D4.)

Petitioner attempts to shift this Court's attention from the actual basis for the District Court's conclusion that the original Complaint was filed with an "improper purpose" to an unfounded basis. Petitioner asserts that the District Court concluded that the filing occurred for an improper purpose due to Petitioner's counsel's failure to serve the original Complaint within 120 days of filing, as set forth in Rule 4(j), Federal Rules of Civil Procedure; Petitioner's counsel claims ignorance of Rule 4(j). Petitioner's counsel argues that ignorance of a procedural requirement should not be a sanctionable event.

At no time before the District Court did Petitioner's counsel advise the Court or Respondents that he was unaware of the 120 day service requirement. Nowhere in the briefs filed with the Eighth Circuit did Petitioner's counsel confess his ignorance of Rule 4(j). The first time Petitioner's counsel brought this statement to light was during oral argument before the Eight Circuit. Not only was it inappropriate to do so then, but it is also inappropriate now.

In making its conclusion concerning whether or not an "improper purpose" existed, the District Court did not consider Petitioner's counsel's ignorance of Rule 4(j). This is evident in that the District Court's opinion clearly identifies the "imporper purpose" as the filing of the original Complaint to coincide with the sentencing of one of the [Respondents]. (Petitioner's Appendix D10.)

Thus, Petitioner's counsel's ignorance of Rule 4(j) is not only untimely but also irrelevant as the same is *not* the basis for the District Court's conclusion of the existence of an "improper purpose".

Petitioner asserts that the District Court failed to investigate Petitioner's counsel's "reasonable inquiry" prior to filing or to assess the signer's credibility. However, Petitioner's counsel's judicial admissions vitiated any requirement of the District Court to conduct such an investigation. *See In re Kunstler, supra.* Such admissions, which the District Court viewed without fear of misinterpretation, handed the Court its basis for imposing Rule 11 sanctions. Petitioner's counsel can look to no one but himself for the action of the District Court.

Along these lines, Petitioner argues that the District Court did not afford him notice prior to imposing Rule 11 sanction. There is no basis for this argument.

Federal Rule of Civil Procedure 11 does not require an evidentiary hearing prior to the imposition of sanctions upon counsel. *Oliveri v. Thompson,* 803 F.2d 1265, 1280 (2d Cir. 1986). Due process of law requires only notice and an opportunity to be heard. *Donaldson v. Clark,* 819 F.2d 1551, 1559-1580 (11th Cir. 1987); *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.,* 815 F.2d 391, 405

(6th Cir. 1987); *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986); *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 205-06 (7th Cir. 1985). When a counsel has full opportunity to brief and to respond to the request for Rule 11 sanctions, counsel has been afforded due process. *Brown v. National Board of Medical Examiners*, 800 F.2d 168 (7th Cir. 1986).

Notice was given to Petitioner's counsel in two ways. First, Rule 11, in and of itself, constitutes notice that sanctions could be imposed. *See Donaldson*, 819 F.2d at 1560. Second, Respondents' motions to dismiss, filed on November 29, 1989, contained Respondents' first request for imposition of Rule 11 sanctions. Either of these notices is sufficient. *Id.*

Petitioner's counsel was given an opportunity to be heard *before* and *after* the court notified him of its intent to impose sanctions.[4] In *Brown v. National Board of Medical Examiners, supra at* 173, "[T]he district court after imposing sanctions on [Appellant's counsel] allowed [counsel] to respond and subsequently entertained a reconsideration motion accompanied by full briefing on both sides." The *Brown* court held such procedure was adequate due process. Such procedure occurred in this case as well.

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[4] Before the District Court entered the initial Order imposing sanctions on March 14, 1990, Petitioner's counsel filed the Suggestions (Respondents' Appendix 2) and a pleading entitled "Plaintiff's Supplemental Suggestions in Opposition to Omnibus Motions to Dismiss, Quash, Strike and For Sanctions", which was filed with the District Court on January 19, 1990.

(Continued on following page)

Judge Stevens was fully aware of all facts relevant to the Rule 11 sanctions. The number of pleadings and orders filed and entered in this case at the District Court level indicates that Judge Stevens spent considerable and valuable judicial resources and time participating in the proceedings. Furthermore, Judge Stevens determined and set forth the specific grounds upon which he was relying in imposing the Rule 11 sanctions, which further establishes that Petitioner's counsel was afforded due process (*see, e.g.*, Petitioner's Appendix D and Respondents' Appendix 1). *See Tom Growney Equipment, Inc. v. Shelley Irrigation Development, Inc.*, 834 F.2d 833 (9th Cir. 1987); *Oliveri v. Thomson*, 803 F.2d 1280 (2d Cir. 1986). Finally, the admissions made in the Suggestions obviated any need for an evidentiary hearing. *Seven-Up Bottling Co. v. Seven-Up Co., supra* at 1251. These admissions are not only conclusive, they are dispositive of the court's authority to order sanctions. *See In re Kunstler, supra.*

Thus, the District Court properly concluded that sanctions were appropriate (and the Eighth Circuit

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(Continued from previous page)

Petitioner's counsel responded three times in writing after the District Court entered its initial sanction Order on March 14, 1990, to wit: (i) a response (as directed by the District Court); (ii) a supplemental response; and (iii) a motion to alter or amend the order entered by the District Court that ruled upon Petitioner's responses to the order imposing sanctions.

Despite having filed these pleadings, Petitioner's counsel *never* requested a hearing on any of Respondents' Motions for Sanctions.

affirmed) because Petitioner's counsel effectively admitted that the original Complaint was filed without the "reasonable inquiry" required of Petitioner's counsel by Rule 11 and for an improper purpose, namely to attract publicity and to harass the Respondents. The Eighth Circuit clearly determined the District Court's conclusion fell within the broad range of permissible conclusions, that no discretion was abused, that sanctions were appropriate and as such, had no basis for reversal.

III. The District Court Properly Interpreted Rule 11 When It Imposed Sanctions Against Petitioner's Counsel, Despite The Lack Of Service Of The Original Complaint And Summons Upon Any Of The Respondents, And When It Awarded Such Sanctions Directly To Respective Counsel For Respondents, As Opposed To Respondents.

Petitioner's assertion that Rule 11 sanctions may not be imposed since Respondents had not been served is summarily dismissed by this Court's opinion in *Cooter, supra,* as well as district court opinion in *Stinson v. American Sterilizer Co.*, 127 F.R.D. 689 (M.D. Ala. 1989), which is virtually "on all fours" with the present case. A District Court's jurisdiction to impose Rule 11 sanctions in invoked by the *filing* of the underlying complaint as violations of Rule 11 are complete when the paper is filed. *Cooter, supra,* 110 S.Ct. at 2456 (citing *Szabo Food Services, Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987)), *cert. dismissed,* 485 U.S. 901 (1988).

The power of a District Court to impose sanctions is not dependent upon service upon a defendant. While

jurisdiction is obviously a prerequisite to entering judgment, the court's power to impose Rule 11 sanctions does not depend upon either in personam or subject matter jurisdiction. The powers inherent in Rule 11 are discussed in *Wojan v. General Motors Corp.*, 851 F.2d 969 (7th Cir. 1988), wherein the court states:

> Recently, we observed that " '[j]urisdiction' is an all-purpose word denoting adjudicatory power. A court may have power to do some things but not others, and the use of 'lack of jurisdiction' to describe the things it may not do does not mean that the court is out of business". *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1077 (7th Cir. 1987). In *Szabo*, we held that not only does a court have the adjudicatory power to impose sanctions under Rule 11 after a Fed.R.Civ.P. 41(a)(1)(i) dismissal, but also regardless of whether a court actually has subject matter jurisdiction (either diversity or federal question), the court retains the power to consider a Rule 11 motion. *Id.* at 1078. This conclusion is founded upon the inherent authority of a court "to determine its jurisdiction and [to] engage in all the usual judicial acts [including imposing Rule 11 sanctions], even though it has no power to decide the case on the merits". *Id.* Our observation in *Szabo* that District Courts possess inherent power over Rule 11 motions even under circumstances where jurisdiction over the underlying case is absent is consistent with the now well-established rule that the "inherent powers of federal courts are those which 'are necessary to the exercise of all others.' "

Petitioner's adoption of a restrictive view of the word "parties" as used in Rule 11 (such that only parties [those who have been served] are entitled to recover attorneys' fees) flies in the face of the policy set forth in *Szabo, Cooter* and *Willy*. The central purpose served by Rule 11 is "to defer baseless filings in District Court . . . ", *Cooter, supra* at 2454, not to provide a loophole for the avoidance of sanctions upon the filing of a complaint filed with an improper purpose merely by delaying or failing to serve the named defendants. Petitioner's assertion further fails when applied to the language of other Federal Rules of Civil Procedure (i.e., Rule 5(a) which identifies defendants as "parties" prior to service).

Additionally, the award of sanctions has no relation to whom the sanctions will be paid. In *Peth v. Breitzman*, 611 F.Supp. 50 (E.D. Wis. 1985), the District Court awarded the attorneys' fees to a person not even named as a defendant, but whom the plaintiff had identified as one of the myriad of conspirators listed in the Tenth Amended Complaint.

It is apparent by now that the Court's power under Rule 11 is broad. Petitioner's argument that the District Court was erroneous in awarding sanctions directly to Respondents' respective counsel, as opposed to Respondents, is baseless. As shown in *Peth*, the Court has discretion to award sanctions to whomever it considers to have been violated. While Rule 11's primary purpose is not "wholesale fee shifting", it is instead a vehicle for the "correction of litigation abuse". *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1987). Petitioner's counsel appears to be more concerned with what he perceives to be a windfall to Respondents' respective counsel than he is

with his own conduct. Both the District Court and the Eighth Circuit approved of the award of sanctions to Respondents' respective counsel; Petitioner's counsel's discomfort with that is not a sufficient basis for *certiorari* review.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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APPENDIX 1

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

DORETHA BRYANT,	)	No. 89-0719-CV-W-8
Plaintiff,	)	(Filed May 15, 1990)
v.	)	
BROOKLYN BARBECUE CORP., et al.,	)	
Defendants.	)	

ORDER

On March 14, 1990 this court entered an order dismissing plaintiff's lawsuit for failure to serve the complaint in a timely manner. *See* Fed. R. Civ. P. 4(j). The court also granted defendants' motions for Fed. R. Civ. P. 11 sanctions, finding that plaintiff's attorney's admission that he did not conduct a complete factual investigation until after the complaint was filed constituted a violation of rule 11 and that his failure to even attempt service of the complaint within the 120 day period provided under Fed. R. Civ. P. 4(j) illustrated that the suit was filed for improper purposes. The court did not, however, enter an award of sanctions at that time as it wanted to give plaintiff's attorney an opportunity to respond to the fee affidavits submitted by defendants' attorneys in support of their motions for sanctions. This response has been received and, consequently, the remaining issues in the case are now ripe for decision.

Plaintiff initially argues that this court incorrectly assessed rule 11 sanctions because defendants, having never been served, may not properly be considered "parties" for purposes of rule 11. In support of this argument plaintiff cites two cases holding that an unserved defendant may not be considered a party for purposes of Fed. R. Civ. P. 54(b). *See e.g., United States v. Studivant*, 529 F.2d 673, 674, n.2 (3d Cir. 1976); *Ferguson v. Bartels Brewing Co.*, 284 F.2d 855, 857 (2d Cir. 1960). These cases are inapposite, however, since the purpose of rule 54(b), defining finality of judgment, differs dramatically from that of rule 11, preventing frivolous or harassing claims.

Although the parties were not able to find any cases directly on point, the court's research revealed one case with facts substantially similar to those presented here. *See Stinson v. American Sterilizer Co.*, 127 F.R.D. 689 (M.D. Ala. 1989). Plaintiff in *Stinson* first filed suit on November 23, 1988, believing that the Clerk of Court would perfect service through certified mail.[1] *Id.* at 691. Plaintiff's attorney did not inquire as to whether service had been made until April 6, 1989, 134 days after filing. At that time he learned that service had not been accomplished. *Id.* Shortly thereafter defendants filed a motion to dismiss and for rule 11 sanctions. After analyzing both the history and purpose of rule 11, the district court found that plaintiff's counsel's conduct was not reasonable and that sanctions were appropriate, even though defendants had not been served, since plaintiff's attorney "had no reason . . . to believe he had acted with due diligence or that

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[1] Apparently this was the practice in that district at the time.

he had 'good cause' for the delay in serving the complaint." *Id.* at 696.[2]

The facts of the instant case are even more egregious than those presented in *Stinson*. Unlike the attorney in *Stinson*, plaintiff's attorney in the instant case did not believe that anybody was attempting to serve defendants; he admitted that he filed the initial complaint to coincide with the sentencing of one of the defendants in an unrelated criminal matter and that he knew he had to conduct further inquiry before he could sufficiently plead the facts necessary to state a cause of action under the Racketeer Influenced and Corrupt Organizations (RICO) Act. Thus, the court reaffirms its earlier holding that the award of rule 11 sanctions in the instant case was appropriate.

Plaintiff argues that if sanctions are awarded, defendants should not receive the full amount of attorneys' fees billed by their attorneys because plaintiff could have voluntarily dismissed her complaint at any time prior to November 28, 1989 pursuant to Fed. R. Civ. P. 41(a).[3] This

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[2] The district court noted that it considered *Ordower v. Feldman*, 826 F.2d 1569 (7th Cir. 1987), in reaching this decision. The *Ordower* court held that rule 11 sanctions could properly be assessed against plaintiffs who did not serve defendants for more than 150 days after filing their complaint. This court relied on *Ordower* in its order finding that sanctions should be assessed against plaintiff's counsel.

[3] Rule 41(a) provides that a plaintiff may dismiss an action without leave of court "(i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs. . . ."

argument is without merit and ignores the realities of most federal court litigation. When a putative defendant reads in the newspaper that a plaintiff has filed a cause of action against him, as was the case here, the defendant must assume that the complaint was serious and will be served. Most defendants placed in such a position will take a course of action similar to that chosen by defendants Brooklyn Barbeque Corporation, William W. Rauschelbach, Sandra Rauschelbach, and Gary Berbiglia and begin to research possible defenses to the complaint so that they may promptly respond to the allegations once service has been accomplished. *See* Affidavit of Joe Coleman ("After the Defendants became aware of the filing of the Petition [sic] in this cause through the newspaper article that appeared in the Kansas City Star on July 29, 1989, the Defendants instructed the undersigned to immediately commence [sic] preparation of their defense in view of the type of allegations alleged against them. . . . "). Similarly, it is entirely reasonable for defendants to begin preparation of motions to dismiss when it appears likely that a complaint will not be served within the period allowed by Fed. R. Civ. P. 4(j).

The court has reviewed the affidavits submitted by counsel for defendants and finds that both the time spent and hours charged for the work related to the motions to dismiss and the motions for sanctions are reasonable. The court does not believe, however, that plaintiffs should be required to pay the legal fees incurred by defendants Brooklyn Barbeque Corporation, William Rauschelbauch, Sandra Rauschelbach, and Gary Berbiglia for research related to the substance of plaintiff's complaint. While this work was no doubt mandated by the filing of the

complaint, it was not merely an exercise in legal research skills and may still be used by defendants since plaintiff has refiled her lawsuit.[4] Although the court could require defendants' attorney to submit additional affidavits, separating the charges for the research relating to the substantive RICO issues from those incurred as a result of the motion to dismiss and the motion for sanctions, the court believes the more prudent course is to award sanctions based on the time charged by the *other* defendants' attorneys for similar work. Consequently, the court will assess sanctions against plaintiff's counsel[5] pursuant to Fed. R. Civ. P. 11 in the amount of $4,030.00 for fees incurred by defendant David R. Schlee, $5,000 for fees incurred by defendants Stockyards Preservation Co., Judith J. Kerr and Preston Kerr, and $5,000 for fees incurred by defendants Brooklyn Barbeque Corporation, William W. Rauschelbach, Sandra Rauschelbach and Gary Berbiglia.

As noted above, plaintiff refiled her lawsuit on March 16, 1990 as case number 90-0265-CV-W-8. Defendants have filed motions to stay all proceedings in the newly filed case until plaintiff's counsel has paid the sanctions assessed in this case. Fed. R. Civ. P. 41(d) provides that

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[4] A different result might be required if, for example, a statute of limitations problem prevented plaintiff from refiling the lawsuit.

[5] Defendants argue that sanctions should be assessed jointly against counsel and plaintiff. The court does not agree. Although plaintiff signed the complaint, there is nothing in the record that suggests that she was in any way involved with, or responsible for, her attorney's decision to file an admittedly insufficient complaint or the decision not to attempt service.

> [i]f a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

This rule applies to cases which are involuntarily dismissed as well as to cases which are voluntarily dismissed. *Zaegel v. Public Finance Co.*, 79 F.R.D. 58, 59 (E.D. Mo. 1978). *See also Hilgeford v. People's Bank, Portland Indiana*, 110 F.R.D. 700, 702 (N.D. Ind. 1986) (Rule 41(b), although it speaks in terms of "costs" and voluntary dismissal applies to both Rule 11 sanctions and to cases that are involuntarily dismissed). Because the court concludes that a stay order is appropriate in this situation, an order will be issued in case number 90-0265-CV-W-8, contemporaneously with this order, staying all proceedings in the newly filed case. Accordingly, it is

ORDERED that defendants' motions for rule 11 sanctions are granted. It is further

ORDERED that plaintiff's attorney pay the attorney of David R. Schlee $4030 as Rule 11 sanctions. It is further

ORDERED that plaintiff's attorney pay the attorney of defendants Stockyards Preservation Co., Judith J. Kerr and Preston Kerr $5000 as Rule 11 sanctions. It is further

ORDERED that plaintiff's attorney pay the attorneys of defendants Brooklyn Barbeque Corporation, William

W. Rauschelbach, Sandra Rauschelbach and Gary Berbiglia $5,000 as Rule 11 sanctions.

/s/ Joseph E. Stevens, Jr.
JOSEPH E. STEVENS, JR.
UNITED STATES
DISTRICT JUDGE

May 15, 1990

APPENDIX 2

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

DORETHA BRYANT,	)	CASE NO.
Plaintiff,	)	89-0719-CV-W-8
vs.	)	(Filed Dec. 13, 1989)
BROOKLYN BARBECUE CORPORATION, et. al.	)	

PLAINTIFF'S SUGGESTIONS IN OPPOSITION TO MOTIONS TO DISMISS; AND MOTION FOR LEAVE TO FILE AND SERVE FIRST AMENDED COMPLAINT.

COMES NOW the plaintiff, Doretha Bryant, by and through counsel, Larry Delano Coleman, P.C., and respectfully proffers to the Court herewith her suggestions in opposition to the motion of the defendants to dismiss. She also moves the Court for leave to file a first amended complaint, on or before December 26, 1989, and to serve same on or before January 26, 1989.

SUPPORTING SUGGESTIONS

1. This is landmark litigation.

2. It involves two of Kansas City's best known eating establishments: Arthur Bryant's Barbecue Restaurant, and the Golden Ox Steak house.

3. There is no question but that the complaint filed on July 28, 1989 has been been served. It has not been

served for very good reasons, which shall be illustrated below.

4. The first reason is the sheer massiveness of the factual predicates undergirding this RICO litigation. The complaint herein was filed to coincide with the sentencing of the brilliant, though malevolent, Preston Kerr, the principal owner of the Stock Yard Preservation Company, which owns the Golden Ox Restaurant; The Livestock Exchange Building and approximately 13 acres of parking spaces around The Kemper Arena. (See *U.S. v. Preston Kerr*, Case No. 88-00030-01-CR-W-3).

5. This same gentleman, Mr. Kerr, in a whirlwind, and through various entities formed by his agents, designees, employees and/or subordinates, acquired Arthur Bryant's Barbecue, from Ms. Doretha Bryant, the heir of the estate of the barbecue legend of that same name. The entities employed by him, jointly and severally in pursuit of his ends were and are: The Stock Yard Preservation Company, Arthur Bryant's Inc. and the Brooklyn Barbecue Corporation. Such, in simple language, is what this lawsuit is about: Mr. Kerr's acquisition and exploitation of the property of Doretha Bryant—*for nothing down*, and *for* nothing *since* in 1984, other than a few hundred dollars per month for rent from a Kerr-controlled entity Brooklyn Barbecue Corporation.

6. Upon information and belief, Arthur Bryant's Barbecue Restaurant presently grosses about $2,000,000 per year, and The Stock Yard Preservation Company presently grosses about $4,000,000 per year. Much is at stake.

7. In order to appreciate the enormous nature of the task at hand, this Honorable Court must know that

undersigned counsel had to study and intensively review the following mammoth files, practically *all* of which have been spawned in the enormous wake of Mr. Preston Kerr:

a. The Probate Estate of Arthur Bryant, case no. 139952 (Jackson County);

b. *Doretha Bryant v. Preston Kerr*, case no. CV84-18083 (Jackson County);

c. *Doretha Bryant v. Preston Kerr*, case no. WD 37906 (Mo.APP.);

d. *Linde Thomson Fairchild Langworthy Kohn & Van Dyke, P.C. v. Arthur Bryant's, Inc.*, case no. CV86-9508 (Jackson County);

e. *Brooklyn Barbecue Corporation v. Arthur Bryant's Inc., et al.*, case no CV86-17755 (Jackson County);

f. *Daniel J. Flanigan v. Preston Kerr, et al.*, case no. 85-0163-CV-W-9 (WDMO);

g. *Daniel J. Flanigan v. Preston Kerr, et al.*, case no. 86-1394 (8th Cir.);

h. *In re the Liquidation of Republic Bank*, case no. CV84-13021 (Jackson County);

i. *Arthur Bryant's, Inc. v. Federal Deposit Insurance Corporation and Republic Bank of Kansas City*, case no. CV86-9407 (Jackson County).

8. In addition, the closing documents evidencing certain licensing agreements and leasing agreements and escrow agreements, themselves, comprise over 1,000 pages, all of which had to be reviewed by undersigned counsel.

9. Further, in that the plaintiff has variously been represented by, and this case has passed through the

hands of, Linde Thomson Fairchild Langworthy Kohn & Van Dyke, P.C.; Gage and Tucker; Shughart Thompson Kilroy; Barbieri and Barbieri, and others, before coming to land on undersigned counsel's desk – all of which are preeminent law firms – this Court can further appreciate the enormity of undersigned counsel's task, since discovery documents, correspondence, and a legion of exhibits had to be reviewed and indexed. On the other side of the litigation the following preeminent firms have variously defended Preston Kerr or his interests, directly or indirectly: Shook Hardy and Bacon; Smith Gill Fischer and Butts; McDowell Rice and Smith; and Husch Eppenberger Donohue Cornfeld & Jenkins, among others. Getting to the bottom of this matter has been no mean task.

10. Lastly, undersigned counsel, himself, has been constrained to engage in litigation in the hope of obviating the need to pursue this RICO in the following cases, since August 1989:

a. *Doretha Bryant v. Brooklyn Barbecue Corporation*, case no CV89-25135 (Jackson County);

b. *Doretha Bryant v. Brooklyn Barbecue Corporation*, case no CV89-8997 (Jackson County);

c. *Brooklyn Barbecue Corporation v. Arthur Bryant's Inc., et al.*, case no CV86-17755 (Jackson County); (GARNISHMENT ACTIONS: against Mercantile Bank of Kansas City and against The Stock Yard Preservation Company);

d. *State of Missouri, ex re., DORETHA BRYANT, relator v. HONORABLE GENE R. MARTIN*, CASE NO. WD 42, 629 (Mo.App.), an abortive mandamus action.

11. In short, the RICO has not been served, because counsel intends to file a first amended complaint within two weeks of the filing date of this response, sufficient information having been gathered to plead with particularly the averments needed to establish anti-trust violations, securities fraud, common law fraud, Civil RICO, and other causes of actions against the named defendants and *other defendants*. It had not been served previously because of the colossal nature of the work needed, *in advance of the opening of discovery*, in order to successfully prosecute this extremely complex, and possibly multi-state litigation. Hence, leave is sought to file a first amended complaint, and to serve same on or before January 26, 1989.

12. Obviously, the defendants are anxious to get on with the instant litigation. Both the plaintiff and her counsel share their enthusiasm, and do not want to disappoint their reasonable expectations. To be sure, the defendants could have been served sooner; however, that would have necessitated several amendments to the complaint as more information became available. But, even though not served, how have the defendants been prejudice? They are still earning money off of the plaintiff's woes, and are financing their defense out of her loss. That they shall be served is *definite*, provided they do not secret themselves, which is a definite possibility. Indeed, they are hereby invited to enter their appearance, after December 26, 1989, if such would serve to assuage their ennui!

13. Undersigned counsel has shown good cause why these extremely complex litigation should not be

dismissed, and has requested relief, to put it on track, now that the necessary groundwork has been done.

14. Attached hereto is a complaint recently filed against Doretha Bryant in California by the wife of Preston Kerr, defendant Judith Kerr, and Hal Juergens, a business associate of Preston and Judith Kerr. Aspects of this litigation are referenced therein.

15. Again, this case is a landmark. It should be allowed to run its course. And does not warrant dismissal, since this plaintiff has not slept upon her rights, she has move with celerity to perfect them.

WHEREFORE, plaintiff prays that her motion be granted.

Larry Delano Coleman, P.C.

Larry Delano Coleman

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed this 12th day of DECEMBER 1989 to:

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/s/ Larry Delano Coleman
LARRY DELANO COLEMAN, ESQ.